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LABOR CASES AND MATERIALS

Readings on the Relation
of Government to Labor

edited by
CARL RAUSHENBUSH
and
EMANUEL STEIN
New York University

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Carl Raushenbush

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PREFACE

This book about the influence of government on labor conditions is addressed to students of society: students of economics, of government, of law. Students of government and law are finding it advisable to study economics more, and especially to give greater recognition to labor problems. Economists have been finding that markets are strongly influenced by governmental actions, and war times and postwar times are bound to find them influenced much more.

Labor matters as well as others are regulated. A few illustrations will suffice. American farm incomes have been regulated by the use of subsidies and crop limitations; and wages have been regulated, but not to the same extent. During the Hoover administration, farm associations were encouraged and under the N. R. A. trade associations were strengthened; at about the same time began a policy of governmental encouragement to labor unions. Government intervention is protecting the health of consumers in respect to canned foods and patent medicines; even earlier, government took steps to make healthier and safer the working conditions of wage-earners. Government is leaning toward compulsory automobile insurance; much earlier it recognized employers' liability for industrial accidents and then it increased that liability by passing workmen's compensation laws.

Governmental regulation of labor matters, like the regulation of other fields, has been sharply increased by the impact of the depression of the 1930's and by the defense problem of the 1940's, though the trend toward the centralization of decisions into the hands of government had begun before. Thus, before 1930, the movement toward old-age pensions was already under way and, on the collective-bargaining side, we find that courts were more and more inclined to give legal force to collective labor contracts. As for the long depression, it led, for instance, to unemployment insurance, and to wage and hour regulation of a sort which, like unemployment insurance, was adapted to lightening some of the weight of the slump for wage-earners. As for the defense crisis, it gave importance to two institutions which had previously been established by government—public employment agencies and public mediation in labor disputes—and worked many other changes as well.

We have divided this book into two parts, one, by Raushenbush, dealing with the influence of government on the relative bargaining power of labor unions and employers, and thus on conditions of labor; the other, by Stein, dealing with changes in conditions of labor brought about by government in dictating certain minimum terms for the labor contract. To a considerable extent these two sorts of intervention overlap; many union demands relate to aspects of the job which are already affected by legislation. But in general the two sorts of intervention complement each other. The changes which bargaining and legislation together are able to bring about are of course limited by "what the traffic will bear."

Since union bargaining power is limited, union members may be glad to be able to supplement it by legislation. But actually there has been much difference of opinion among unionists as to whether the state is an aid to unions or is a rival to them—

whether its power should be invoked or shunned. In the past this has been a problem of how much energy unionists can devote to political methods without losing interest in collective bargaining. If, in the future, the question becomes one of whether the state will swallow the unions, as it did in Germany in 1933, the outcome will be determined by general economic-political forces, of which only one part will be the political consciousness and the political demands of the working class.

"Government" and "the state" here refer to the complex of governmental officers and agencies—some of them local, others state, others federal. In labor matters, as in many fields, state government has become more important than local government and federal government is well on its way to being more important than state. Among governmental agencies, the legislature is the chief rule-making body. "Common law" decisions by courts are less frequent than they were; today there is usually some sort of statute or legislative enactment to guide conduct. Statutes often are written, however, in rather general terms. Traditionally it is up to the judges to decide what these general terms mean, when someone brings a case before a court. They still have to do a good deal of this interpretation, but legislatures have now entrusted much of it to administrative agencies. An administrative agency may be authorized to announce rules intended to give content to the vague statute; it may be authorized to interpret the law as cases come up, playing the role of a specialized court; and it may be authorized to do both.¹ Even in connection with laws for which the legislature has provided no such elaborate administrative agency, the officials who execute the law have some discretion in how to interpret it and to whom to apply it. From their decisions, and the decisions of administrative agencies, there is always the possibility of an appeal to the courts. And there is always the possibility of an appeal to the legislature to have the law amended in such a way as to supersede the interpretations made by judges and administrators.

When courts interpret laws, either directly or on appeal from some administrative agency, they sometimes make them much weaker than had been expected, sometimes going so far as to declare that the law is unconstitutional and void. The most usual ground for declaring a labor law unconstitutional is that it deprives a company to an unreasonable degree of the free use of its property—of its freedom to contract with its employees. The constitutional phrase usually referred to in these cases is "due process of law." Another type of law is one limiting trade unions; this sort is most likely to be attacked on the ground that it unreasonably limits the unionists' freedom of speech. Laws passed by Congress may also be attacked on the ground that they are outside the interstate commerce power and the other enumerated powers of Congress. A decision by a high court against the constitutionality of a law can, in theory, be upset only by a constitutional amendment. But we shall see cases in which courts reversed themselves.

Of the materials printed in this book, the law-cases are decisions of courts (in one case, of an administrative agency) which interpret and apply various labor laws. In a good many of these cases, the courts were called on to decide whether or not the laws in question were constitutional. Of the other readings in this book, a number are reprints of important laws or parts of them, others are summaries of the legislation on certain subjects in the various states, and others explain what choices faced legislatures

¹ See, for instance, Frederick F. Blachly and Miriam E. Oatman, *Federal Regulatory Action and Control* (Washington: The Brookings Institution, 1940); James Hart, *An Introduction to Administrative Law, with Selected Cases* (New York: F. S. Crofts & Company, 1940).

in connection with proposed legislation. The readings also include some personal reports of labor events.

Limitations of space have forced us to make certain choices—to make certain omissions. Though some of the court opinions have been reproduced almost in full, in others we found a good deal of material not essential to our purposes and cut freely. The names of the cases cited by the judges as precedents in making decisions have usually been omitted unless we felt that it would be useful for the student to look them up.² No attention is paid to the wage-earner's role as a consumer. The internal affairs of unions—the rights of the member against the union and against possible racketeering leaders—are touched on only briefly in connection with the closed shop. General governmental health insurance has not yet become actual, except for workmen's compensation, therefore only workmen's compensation is treated. The administration of workmen's compensation laws and of the many other labor laws covered is in effect a subject by itself; we could not do justice to it in this book and it therefore is brought in only incidentally.

We present this volume of cases and other readings because we believe that, given students' limited time, it is more interesting and educational for them to read about a number of important illustrative situations than it is to read a textbook which touches hastily on almost everything. In saying this, we assume that a teacher using this book will encourage his students to use the materials in it to formulate a statement of why laws and rules are demanded and resisted, how they come into existence, what sorts of people interpret them, and what interpretations the judges give to the more important statutes.³ The authors (who admit having written parts of a textbook⁴) urge the basic superiority of a case-book, arguing partly from the experience of the law schools of America, which found that the case method brought the student closer to the living law, and partly from their own experience in teaching economics.

If the teacher does not want to rely wholly on the case method, he may mix textbook and case-book. The bibliography suggests some textbooks dealing with government and labor which may well be used with this book, as well as listing specialized books in connection with each chapter.⁵ The reader will of course find that in this book we have not simply presented him materials, but have arranged the materials in a rough pattern, giving short introductory notes to the various chapters and subdivisions where

² A good many such court decisions date after 1936 and, to read these, it is not necessary to have access to a law library, since they can be looked up in the Commerce Clearing House *Labor Law Service* or in the *Labor Relations Reporter*.

The spelling and other forms used are, with a few exceptions, those found in the original. As a result, spelling is not uniform throughout the book. The law-cases printed here were taken from the official reports, which are cited first, after the name of the case. Some recent decisions were taken from advance prints.

We have omitted from the cases and other readings those footnotes which were not relevant to our purpose. We have taken the liberty of not noting the omission of footnotes, but have simply numbered consecutively the remaining notes plus any which we ourselves found it necessary to append. The latter are distinguished by being signed by the editor's initials, either C.R. or E.S. Material inserted in the text by the editors is enclosed in square brackets. In some cases such bracketed material replaces text material; in others it is an addition.

³ These interpretations (and, in some fields, the "common law" rules of the judges) tell "what the law is" in various fields. Where the law has remained fairly well settled, the reader will find that the cases reprinted may date back several decades. In fields in which it has changed, he will find that most of the cases printed are recent ones. Within each section the readings are almost always in chronological order.

⁴ Stein, Davis, and others, *Labor Problems in America* (New York: Farrar and Rinehart, 1940), Part IV, "The Employer's Approach to the Labor Problem," by Emanuel Stein, and Part V, "The State's Relation to Labor," by Carl Raushenbush.

⁵ A fair proportion of these books are ones which are likely to be found in smaller libraries.

they seem necessary, and longer introductory notes where the subject is more difficult and where more orientation is needed.

This book may be used not only in a course in labor legislation or one in trade unionism, but also in the usual course on labor problems. In the latter case it would have to be supplemented by a text-book or other general materials, since we assume *that the reader has some knowledge of labor problems, as well as of American government.*

CARL RAUSHENBUSH
EMANUEL STEIN

GOVERNMENTAL INFLUENCES ON
COLLECTIVE BARGAINING

Edited by
Carl Raushenbush

INTRODUCTION TO PART ONE

In this half of the book, the part on "Governmental Influences on Collective Bargaining," there are two main topics: the legal duties which unions owe to companies and, second, the legal duties of companies to unions and unionists. The parties to the labor conflict may get from governmental agencies not only formal legal help but also informal help, such as propaganda services. It will therefore be better to think of these two main topics broadly as "governmental help to companies" and "governmental help to unionists." Since unions have not been able to assert many positive legal rights against companies until recently, we shall postpone consideration of the aids which they get from governmental agencies till after we have taken up governmental aids to companies.

First are three chapters which illustrate the rights of companies and also show some of the restrictions which have been put on those rights in recent times. These three chapters all deal with picketing and with freedom of speech for unionists, but each takes up a different aspect of this matter. The first chapter, "The Borders of Violence," considers the problem which has always been the central one in the relation of American governments to unions: In preventing pickets from using violence or intimidation, what are proper methods of policing? Subsidiary questions include the following: What agencies should handle the problem? When is violence seriously threatened? Should injunctions be issued against all picketing if there has been some violence, or should peaceful communication be allowed despite it? How far may police go in frightening unionists in order to make sure that they do not use violence in picketing?

The second chapter deals with general, sweeping prohibitions on peaceful union activity—injunctions forbidding peaceful persuasion to unionize, legislation forbidding in general terms the peaceful distribution of leaflets or peaceful picketing, limits on peaceful assembly and on speech-making. The chapter is called "Unionists' Right of Free Speech" because it raises the question to what degree courts and legislatures will permit free speech to unionists despite the fact that unionism is not a popular cause. We shall see that in recent years the higher courts have more and more acknowledged that unionists have a fundamental right of free speech.¹

The third chapter, "Suspect Union Projects—Boycotts and Others," deals with a variety of situations in which courts have been inclined to issue orders forbidding peaceful union activity, giving as their reason that there was a fundamentally illegal character to the particular project which the union had undertaken. In many cases a demand made by the union (for instance a demand for the closed shop) is said to show an "illegal purpose." In many other cases the project is a boycott rather than a

¹ The question to what degree police will prevent free speech (viewing the police as more or less self-acting and not the mere instruments of courts and legislatures) is taken up not in Chapter 2 but in Chapter 1 (on union violence), because threatened violence by unionists is so regularly the reason or excuse for police limits on free speech. Of course the notion that unions are likely to use violence lies somewhere back of most of the limits on free speech listed in Chapter 2, too. This situation is most obvious in the case of the criminal-syndicalism laws, which purport to cover only organizations which advocate industrial or revolutionary violence, but have been used to create general bans on freedom of assembly or to get rid of radical union leaders in order to hinder union activity in general.—C.R.

strike, and this sort of undertaking is often viewed with suspicion.² Since the law is unsettled on these as on so many other points relating to labor problems, we label the reported union projects "suspect" rather than "illegal." Strikes in essential industries are suspect also, but the question of prohibiting them is not considered till the next chapter, when it can be taken up in conjunction with devices like mediation and arbitration.

In these "suspect projects," the issue is often presented as one of free speech, somewhat as it was in connection with the more general prohibitions mentioned in Chapter 2. In both cases, the problem is one of weighing the good of free speech against the possible ill of union interference with business. The court opinions sometimes state this problem, but they rarely deal explicitly with it. Their conclusions are likely to reflect an unspoken major premise that unions are—or are not—valuable social institutions.

Government encourages mediation and arbitration as methods of avoiding strikes. It puts special hindrances in the way of striking in essential industries, and in taking away some union freedom in such industries it often makes a special effort to introduce mediation and arbitration as a substitute. Chapter 4, "Mediation, Arbitration, and Essential Industries," therefore deals with special mediation and arbitration arrangements in certain essential industries. It also deals with various inhibitions on unions in essential industries, and, on the other hand, anticipating Chapter 5, it deals with various rules against company interferences with unionization in essential industries. It also deals with mediation and voluntary arbitration in industry in general, giving more emphasis to intervention by government than to intervention by private persons and agencies.

Finally, Chapter 5, "The National Labor Relations Act," considers the moral and legal supports which the National Labor Relations Board gives to unions. The Board gives this support under the terms of the National Labor Relations Act, which Congress passed in order to make it more likely that conditions of labor will be set by collective bargaining, and thus will be more favorable to employees. Other positive legal rights of unions are mentioned and so are leading criticisms of the National Labor Relations Act.

A student who is interested in certain subjects will find that they cut across these five chapters of Part One. For instance, if he is interested in the injunction method, he will find the first consideration of it at the end of Chapter 1, and then more material in Chapters 2 and 3. He will find that injunction cases affected by anti-injunction laws are not separated sharply from other injunction cases. He will find injunctions sought on behalf of unions under the National Labor Relations Act chiefly in Chapter 5.

If he is interested in the federal anti-trust law, he will find material on its use in violence cases in Chapter 1; necessarily mixed in with this he will find general considerations of the use of this law in labor regulation. A good many other anti-trust cases are to be found in Chapter 3, under headings that indicate the law's application to various sorts of boycotts. The index will help him find his way across chapters.

If he is interested in the doctrine of *N. L. R. B. v. Fansteel Corporation*, he should notice that there is another case with a similar name in another chapter—in a sense a part of the same problem, though legally different. Similarly, the earlier stage of the case of the *Meadowmoor Dairies* appears in a chapter different from that in which

² Boycotts are often classified as "illegal means" along with violence and misrepresentation, as distinct from "illegal purposes." This is a possible and sensible classification, but boycotts are here classed with strikes having suspect purposes because in both situations the judge is called on to forbid all peaceful picketing on the plea that the project is basically unreasonable.—C.R.

the later stage appears, since the two courts seemed to have entirely different reasons for arriving at the same result. The table of cases will help him find the several references.

We may divide the history of the relation of government to collective bargaining in the United States into three main phases. A fourth is perhaps under way. Suppression was the usual practice of the period 1800-35. Toleration of unions plus limitations on some union activities characterized the period 1835-1932. Encouragement of unionization and a reduction in the limits on union activity marked the period 1932-41; but beginning about 1937 there appeared an anti-union trend, reinforced in 1940-41. The materials printed in Part One cover only the last fifty years—in fact most of them relate to the last twenty-five years, namely the end of phase two, phase three, and the possible beginning of a phase four.

Suppression gave way to toleration just before the business decline of 1837 killed the early union movement of the Jacksonian period.³ When the union movement revived substantially in the 1880's, it operated in what may on the whole be called an atmosphere of toleration. To be sure, the rapid revival of the movement brought many repressive laws, but it also brought some official mediation and arbitration. The facility with which companies could prevent various union activities was increased by the invention of the labor injunction at the end of the 1880's, an invention officially approved in Washington through the *Debs* decision of 1895. Moreover, the limitations on union activity became more noticeable as unions grew with the help of the boom after the Spanish-American war. Legal limitation of unions might have been offset by the laws which were passed forbidding companies to discriminate against union members, but these laws were declared unconstitutional, as we see in the *Adair* case. The boycott began to grow up alongside the strike and it was officially frowned on more than striking was. The Sherman Anti-Trust Act of 1890 was invoked against it, for instance in the *Danbury Hatters Case*. When the Sherman Act was modified by the Clayton Act in 1914, the amending clauses were worded very cautiously. Inhibition on union organizing reached a climax in the *Hitchman* decision in 1917.

The war period, 1917-18, was an interlude of moderate government encouragement to trade unions, as can be seen in the principles of the National War Labor Board. But the years immediately following were marked by a strong anti-union and anti-radical movement in which government played an important role. One phase of the movement was the attempt of Kansas to substitute arbitration for strikes, an echo of which is heard in the *Dorchy* case. The Sherman law continued to be applied to various sorts of labor boycotts, as in the *Brims* and *Bedford* cases. General restrictions on picketing resulted not only from injunctions but also from anti-picketing laws, such as that in *Thomas v. Indianapolis*. A formula for semi-restriction on union activity crystallized in the Railway Labor Act of 1926, which emphasized mediation and arbitration. Its restriction was diluted by a clause which could be interpreted to forbid company unions, as we see in the *Texas & New Orleans* case.

An era characterized by lessened restrictions on unions began about the time of the

³ John R. Commons and Eugene A. Gilmore (ed.), *A Documentary History of American Industrial Society* (Cleveland: Arthur H. Clark, 1910), vols. 3, 4, and supplement. The period of temporary toleration began when juries started, in the 1830's, acquitting strikers indicted as "conspirators," even though they had used intimidating methods. It is usual to say that a century-long period of toleration for unions in the United States began in 1842, when Chief Justice Shaw wrote his opinion in *Commonwealth v. Hunt*, 4 Metcalf 111, 45 Mass. 111 (1842), but it has been pointed out that its toleration was of a limited sort. James M. Landis, *Cases on Labor Law* (Chicago: The Foundation Press, 1934), pp. 32-33, referring to *Nelles*, "Commonwealth v. Hunt," *Columbia Law Review*, 32:1128 (1932).—C.R.

Norris-LaGuardia Act, 1932, as can be seen in the *De Jonge*, *Senn*, *Lauf*, *New Negro Alliance*, *Williams v. Quill*, *Wilson & Company*, *Fur Workers*, *Rohde*, and *A. F. L. v. Swing* decisions. The Sherman law was reinterpreted in the *Apex* and *Hutcheson* cases. An increase in union activity, especially after 1933, led also to repressions, for instance to anti-picketing legislation, but this sort of legislation was invalidated by the *Hague*, *Schneider*, *Harris*, and *Thornhill* decisions. The vindication of free speech by these decisions seems to have had a limit set to it by the Supreme Court's opinion in *Milk Wagon Drivers v. Meadowmoor Dairies*.

During the same period (about 1932-41) unions enjoyed a renewal of the positive encouragement which they had experienced in 1917-18. The N. R. A. of 1933 and the National Labor Relations Act of 1935 (as well as the amended Railway Labor Act of 1934, which built on the *Texas & New Orleans* decision) ensured to majority unions a measure of recognition by employers. The National Labor Relations Board's decisions were almost always upheld by the Supreme Court, though for a time in 1938-39 the Court seemed to be withdrawing part of its support, in the *Consolidated Edison*, *Fansteel*, *Sands*, and *Columbian* decisions, and Congress too seemed on the point of drastically amending the act.

These last-named events may be connected with the fact that public approval of unionism seemed to reach a peak at the same time that business activity and strikes reached a high in 1937. The admixture of repressive anti-union measures increased, notably in laws passed by Oregon in 1938 and by Michigan, Wisconsin, and Minnesota in 1939. The national defense crisis which began in 1940 was the occasion for considerable opposition to unions and to strikes and many proposals were immediately made for federal legislation to forbid or limit strikes; but the tendency of the administration seemed to be to follow the model of 1917-18 namely, recognition for unions plus informal but potentially drastic limits on them, to be introduced if mediation and arbitration failed.

CHAPTER ONE

THE BORDERS OF VIOLENCE

The words "strike" and "union" are likely to bring to mind pictures of violence—of union members on picket lines shouting and interfering with people entering a factory or a store. We respond in this way because such episodes are the dramatic part of the labor scene. Newspapers report them, and readers remember them. Peaceful union activities get less attention. Both peaceful methods and violent methods are economic factors in the process of determining wages; intimidation as a method sometimes increases the economic bargaining power of the union which uses it, and sometimes it backfires in such a way as to decrease the union's advantage and bargaining power.

We shall see later that government sometimes mediates in labor disputes, but our tradition of free enterprise has in the past kept that type of intervention at a minimum and has largely confined government to the preserving of law and order. As a result, most of the contacts of strikers with government have been their contacts with the police. Murder is not unknown in labor disputes, but the run-of-the-mill fracas which brings unionists in touch with the law lies on the borders of violence; it is

police-court stuff—angry words, a scrap, a crowd taking sides.

Under cover of preventing strike intimidation, policing is quite likely to hinder the peaceful running of the strike and peaceful communication with non-strikers. If the strikers' conduct does not include violence, companies sometimes try to provoke them into violence or pretend that there has been violence, so as to justify a thoroughgoing suppression. In a unionizing campaign there is likely to be less violence than in a strike, but the company may invoke police methods by stressing the idea that unions are necessarily violent.

The first section of this chapter gives illustrations of industrial violence, some of the reasons for it, and some idea of public reaction to this violence. The next two sections describe the policing process, which is based on general statutes against violence and on the general power of the public police, a power in which private police seem to share. The last two sections discuss situations in which companies were able to invoke special legal devices against violence: the anti-trust laws or the injunction.

I. LABOR VIOLENCE, STRIKER OPINION, AND PUBLIC OPINION

When there is a conflict between groups, it may become intense enough to make members of each group, normally peaceful, feel that it is right to use force against the other. Employer-employee relations easily become tense; they are characterized by emotional, unreasoning responses on the part of the two parties and also on the part of the public, the members of which identify themselves with one side or the other, often subconsciously. To the man on the picket line, the "scab" is an enemy. To the police facing pickets, the

pickets become an enemy. Officials who control police usually, though not always, reflect the prevailing public attitude toward union violence. Public attitudes and official decisions about the permissibility of union activities—both the violent activities treated in this chapter and the non-violent activities treated later—are largely determined by the general opinion prevailing in the community as to whether unions are or are not useful institutions. Decisions about union means turn on impressions about union ends.

MOTHER JONES ATTENDS TO THE "SCABS"¹

The company tried to bring in scabs. I told the men to stay home with the children for a change and let the women attend to the scabs. I organized an army of women housekeepers. On a given day they were to bring their mops and brooms and "the army" would charge the scabs up at the mines. The general manager, the sheriff and the corporation hirelings heard of our plans and were on hand. The day came and the women came with the mops and brooms and pails of water.

I decided not to go up to the Drip Mouth myself, for I knew they would arrest me and that might rout the army. I selected as leader an Irish woman who had a most picturesque appearance. She had slept late and her husband had told her to hurry up and get into the army. She had grabbed a red petticoat and slipped it over a thick cotton night gown.

¹ Time: about 1900. Place: outside a coal mine. *Autobiography of Mother Jones* (Chicago: Charles H. Kerr and Co., 1925, pp. 34-35. Used by permission.—C.R.

She wore a black stocking and a white one. She had tied a little red fringed shawl over her wild red hair. Her face was red and her eyes were mad. I looked at her and felt that she could raise a rumpus.

I said, "You lead the army up to the Drip Mouth. Take that tin dishpan you have with you and your hammer, and when the scabs and the mules come up, begin to hammer and howl. Then all of you hammer and howl and be ready to chase the scabs with your mops and brooms. Don't be afraid of anyone."

Up the mountain side, yelling and hollering, she led the women, and when the mules came up with the scabs and the coal, she began beating on the dishpan and hollering and all the army joined in with her. The sheriff tapped her on the shoulder.

"My dear lady," said he, "remember the mules. Don't frighten them."

She took the old tin pan and she hit him with it and she hollered, "To hell with you and the mules!"

A PROPERTY RIGHT IN THE JOB

Union men, in their thinking as such, are unable to divorce themselves from their jobs. It must be borne in mind that they have fought for years to raise the wages—in the case of the Ironworkers twenty-five years ago from \$2.30 for ten hours' work to \$4.30 for eight hours—to shorten the hours and generally to improve conditions for themselves. They have been paying union fees for years, attended meetings, gone through dozens of strikes and lockouts, and been black-listed, clubbed and fired upon by the police and the employers' gunmen. They

have worked and suffered to make the job what it is; therefore, the job *belongs* to them—and there is no room for argument. The job is *their* job! So the scab, who not only had contributed nothing toward the improvement of the job but had been one of their worst enemies while they were improving it, has his face smashed and the builder, who employs him, has his structure dynamited. They are unwilling to listen when one tries to remind them that the scab often is a scab because he cannot help it; because he hasn't the price of the union's initiation fee and now takes a job at low pay in preference to starving to death. To hell with the scab! The union is their union; the job is their job—their racket—and that is all

¹ Louis Adamic, "Racketeers and Organized Labor," *Harper's Magazine*, 161:409, September, 1930. Used by permission.—C.R.

there is to it! They raise the initiation fee till the workman outside cannot join the union but must remain a scab—but "that's

his hard luck." He is slugged if he gets work on a job that union men consider their job.

PICKETING AS PROTEST ¹

On June 2 [1922, two months after the unorganized soft coal miners of Somerset County, Pennsylvania, walked out in response to a national strike call, there] began a long series of court actions in Somerset on the question of picketing. Hundreds of men and women were fined or imprisoned by Judge Berkey for picketing acts, ruled to be violations of the injunction. The court proceedings faintly reflected changes in the mining camps, a growing tensivity in the warfare there. The larger companies' determined efforts to resume production had obtained them a nucleus of a few of their old workers and a larger number of farmers and of imported miners. The picket lines became all-important to the strikers.

This stage in a mine strike never lends itself readily to "rules of war" set by a court. Especially a guerilla affair, its course is determined largely by the temperaments, habits or judgments of individuals, or by accidents. Characterizing one side or the other as uniformly "peaceable" or invariably "intimidating" merely emphasizes the large numbers of exceptions. Attempts by courts to "civilize" the war may be as remarkably successful as are international rules in international war; the significant thing was that in Somerset such rulings were in the hands of one man, without code or jury.

A dilemma early confronts mine strikers: "How shall the scabs be treated? Treat 'em pretty, persuade 'em? Or cut 'em dead, drive 'em out?" The local un-

ions may "decide" on one policy or the other; as a matter of fact the individual members do as they feel or as accidents may determine. There will be no unity; a year after the strike began, union meetings in Somerset were still at times debating violently that question. "My son returned to work four months ago; I've not spoken to him since."—"How are we going to get them if we don't argue with them?"—"In our town no union man would be seen standing on the same block with a scab."—"I went to the ball game with four scabs and three promised to quit tomorrow."—"We've coddled the scabs for a year and they call us —; only thing to do is scare 'em or drive 'em out."—"Boys, remember, violence never won no strike." So went the stormy meetings in May, 1923. Early in a strike, the divisions in a camp may be little more than a kind of social bloc. A lot of the Somerset testimony, from which the court was expected to evolve serious verdicts of "intimidation" reads like an account of fashions, a comedy of manners. The Windber lawyers alleged that John Swanson, who returned to work, was threatened and intimidated by James Gibson. Gibson on the stand explained:

One morning John Swanson passed us, Bert Thompson and I; and said "Good morning, boys" and we never spoke. After he passed he said "Go to hell, goddamn you."

In weeks and months the social bloc intensifies; individual strikers and individual strikebreakers or guards may be "out to get" each other, irrespective of anybody's judgment. Fights easily get going; then the whole picket line is immediately represented to the court as not peaceable. And on a given morning, with one

¹ Heber Blankenhorn, *The Strike for Union: A Study of the Non-union Question in Coal and the Problems of a Democratic Movement, Based on the Record of the Somerset Strike, 1922-23* (New York: The H. W. Wilson Company, 1924, published for the Bureau of Industrial Research), pp. 130-32. Used by permission.—C.R.

fight started, the line may turn anything but peaceable.

The picket line is the heart of a strike, in a mine camp where only the highroad is not company-owned, where for a striker to step off, or be forced off, the road means instant lawful arrest for trespassing. The only chance the striker has to see or count or speak to the strikebreakers is the fleeting moment, morning and evening, when the strikebreakers cross the road on their way to and from the mine mouth. There is time for only a manner and a phrase: "No work tomorrow, men;" or "Don't you know you're taking the bread out of women's and children's mouths?" or "Be a man; be American; why be scared of the boss?" or "Who's keeping your wages up; it's us." With the super and the guards standing by, few strikebreakers will stop to converse; instead some will earn merit by replying loudly: "You goddam hunk-ey, you go to hell."

The theory of picketing truthfully reflects this dual attitude of union men to strikebreakers; besides being persuasion, picketing is also protest. It is meant to advertise first the existence of a strike, then the plight and the endurance of the strikers, their families and their union. To enforce the protest, women and children frequently take to the picket line,

with symbols of ridicule or shame; offering the strikebreakers bread crumbs and pennies "if you're so hard up you gotta work in a scab mine." At one mine the first man to return to work was attended by a striker's wife with a shotgun on her shoulder "to protect the poor feller who wants to work under guard." Shouting "scab" having been ruled illegal, pickets would innocently scratch themselves in the sight of strikebreakers or their children called "cuckoo" in cheery bird-lover tones.

All these overt acts marched solemnly into court, via sworn legal papers, demanding "a rule." At Twin Rocks a tin-can-cowbell band picketed the streets: "Mary Robincsok, age thirteen, Mrs. Ando, basso cowbell, Mrs. Onderko, tenor tin can, Mrs. Berish, double bass wash tub, Mrs. Mugara, cow bell in B flat, Mrs. Mahanchik, pot lid cymbals, Mrs. Korach, artistic dancer"—fourteen in all were taken to court in Ebensburg, fined, and their performance forbidden. In Boswell, when many men pickets were in jail, small boys and girls with tin horns led a very yellow dog through the streets, and carried a straw dummy, which they occasionally lynched; "the scabs were getting wild, some quit, then the justice stopped the whole thing." . . .

CAN STRIKE VIOLENCE BE PREVENTED?

Why . . . is private coercion tolerated in American industrial life? For one underlying reason: that to suppress it would defeat the ends of labor organization, and the general public believes in the right of labor to organize.

There are only two ways in which private coercion can be eliminated. The first is to enforce rigidly the law against breach

of the peace and to execute injunctions promptly within the framework of the present law of strikes. By this action the picket lines would be dispersed, the sit-down strikers evicted. Strikers would be replaced at the will of the employer, and strikes broken with comparative ease. The National Guard might keep the peace intact and the chimneys smoking. But the result of such action would be that the wage and hour negotiations of labor leaders would be a vacuous farce. A union which cannot effectuate a strike cannot bargain. It can only beg. The suppression

¹ Marvin J. Barloon (Department of Business and Economics, Western Reserve University), "Violence and Collective Bargaining," *Harper's Magazine*, No. 1080: 633-34, May, 1940. Used by permission.—C.R.

of violence would be the suppression of labor.

A case might be prepared to support this policy. There are informed students who believe that the American economy would be more sound in the absence of unionism, that American labor and capital would produce more goods for the people. There are intelligent and public-spirited industrialists living with the conviction that they know better what is good for the people and for their workers than does the union agent. Indeed, it is, for the sake of argument, at least conceivable that wages might be higher and employment more steady if industry could proceed unhampered by the restrictions of unionism. Be that as it may, however, there is no real prospect that this case will prevail. The conception of civil order maintained under the bayonets of soldiery is repugnant to democratic sensitivities. Few will contend that the American people will ever pursue a policy which would thus completely suppress organized labor.

The other way to eliminate private coercion also includes a rigid enforcement of the peace and a prompt execution of injunctions, but *within a modified labor law*. If coercion now performs a function essential to collective bargaining, and if democratic government is to sanction that collective bargaining, it follows logically that the coercion necessary to the effectuation of collective bargaining should be

exercised by the government itself. . . .

But the crucial requirement is this: When a union designated by . . . a secret ballot calls a strike it might be made a violation of law for the employer to continue operations within the field of employment to which the strike applies until the workers, acting through their union, elect to return to work. Under this provision collective bargaining based on the potentiality of an effective strike might proceed without the implement of coercive picketing. This is the only way in which we can suppress violence in labor disputes without suppressing organized labor.

It may appear that such a provision would place a business enterprise completely at the mercy of the union. At the pleasure of the workers' organization the shop could be closed at any time for as long as the union wished. Would this power not reduce collective bargaining negotiations to a travesty of union dictation? Decidedly not. It must be borne in mind that a strike means a stoppage of wages, and that the staying power of the strikers is limited by their meager resources and the urgent pressure for the necessities of life. The employer of course suffers from the failure to recover his fixed costs, from the loss of profits which a stoppage entails. But meanwhile his employees suffer from hunger.

THE MAYTAG WASHER STRIKE

The following are a few of the highlights of the struggle [at Newton, Iowa, in 1938]:

May 10th. Picketing begins; worker roughed up; no plant operation.

June 4th. Two hundred employees demand relief from county.

June 8th. Wage parleys broken off.

June 12th. Back-to-work group claims 500 signed.

June 22nd. Permanent injunction against mass picketing, etc.

June 23rd. Governor refuses Union request for arbitration board; 350 men occupy plant and stage sit-down.

July 1st. Negotiations reopened; sitters vacate plant.

July 5th. Governor urges acceptance of ten per cent cut; Union urges arbitration.

¹ Albert W. Palmer, Frank W. McCulloch, and Stoddard Lane, "Labor Troubles and the Local Church," *Social Action*, 5 (no. 1): 19-20, 23-25, 26, January 15, 1939. Used by permission.—C.R.

- July 6th. Indictments for conspiracy, etc., returned against some Union men.
- July 8th. Mass picketing renewed; mayor, sheriff call for volunteer deputies.
- July 9th. Governor appoints arbitration board; no assent by company.
- July 14th. Union leaders sentenced to six months and \$500 for contempt of injunction; court offers parole and non-prosecution of other cases, if strike called off.
- July 16th. Arbitrators report; approve wage cut on conditions.
- July 17th. Union accepts arbitrators' proposal; company declines.
- July 18th. Plant reopens; 450 men return to work.
- July 19th. Picketing renewed; plant-bound trucks stopped; troops ordered.
- July 20th. Troops arrive; three non-union men seriously hurt in fighting at plant gate; governor orders plant kept closed.
- July 30th. Governors orders N. L. R. B. hearing stopped.
- Aug. 2nd. N. L. R. B. orders hearings renewed in Des Moines on August 4th.
- Aug. 3rd. Governor orders plant reopen on company terms; 12 Union men not to be rehired; revises order on N. L. R. B. Union rejects company terms but votes return to work "under protest."
- Aug. 4th. 1400 men return to work. (Negotiations over contract, hearing before N. L. R. B. and criminal prosecutions still remain unsettled. Dec. 1, 1938.)² . . .

Many of the Union activities drew the fire of the Arbitration Board. The eight-day sit-down demonstration, the mass picketing and the barring of entrance to the plant were declared unlawful by the Board and by the local courts. Participants, while credited with being "upstanding citizens with a record for obedience to law," were on this occasion misled and badly advised.

Some townsfolk were more bitter in their comments. "Those outside leaders and Communists transformed the Maytag men into a lawless crowd. They damned the courts, derided the police, insulted the Maytags for their possession

of property and defied all employers," said a leading Newton publisher, in whose own plant some organization was attempted.

Until the brief outbreak of street fighting and serious injury to three non-union men on July 20, however, the only casualties generally admitted were a few persons shoved and one torn shirt. Probably the bitter attacks on the Maytag family in the public utterances of the St. Louis organizer who was an admitted Communist, brought more resentment even than the reported threats of violence to non-union men.

"Yes, we made mistakes," a Union leader agreed, "and it was too bad that hot-heads provoked the fight the morning the troops arrived." But they asserted there were excesses by the agencies of law and order also in the wholesale arrests that were made. Unusual to say the least, they claimed, was the offer of the judge to parole the Union leaders sentenced for contempt and to secure the dismissal of all further prosecutions if they would call off the strike. Other sworn testimony before the Labor Board told of the prosecuting attorney granting immunity from grand jury indictment to a Union defendant who signed a back-to-work card.

"The few unfortunate outbreaks were largely provoked by the constant exaggerated charges that 'law and order has broken down in Newton,'" said a local official. "The Union boys weren't really a lawless group. When the crowds around one of the stores got too large, I just suggested two policemen be commissioned to keep the folks moving. It took away the audience, and things quieted down right away.

"I remember too," he recalled, "when they wanted me to issue warrants and set \$1,000 bail on some of the boys who interfered with a police car. We finally agreed not to set such high bail for the maximum fine was \$100 and next day be-

² By Frank W. McCulloch.—C.R.

fore the arrests could even be made the boys came in and surrendered."

In general Company representatives interviewed expressed much less agitation about the charges of lawlessness and violence than the townspeople who took their side. An experienced news reporter attributed the outbursts of Union men to "a strange new sense of power that they seemed to get from being in the Union and which they didn't exactly know how to use." A strong combination of community forces was certainly arrayed against the Union: the press, the courts, business and farm groups and churches.

"We were out to join every force possible to combat C. I. O. viciousness," said the editor. "There was no middle ground. When Ramige came out with his resolution of sympathy and support for the C. I. O. and expressing the hope they would win the strike, of course we bucked him."³ Apparently no one claimed the

church had no concern with such conflicts. In fact the minister of another church was very active in many groups opposing the Union. "Several Maytag workers said of me," he reported, "If he'd stayed out, we could have won.' And I think that's partly true."

A leading Iowa paper that would not "line up" received such comments from Newton persons as "This is the last business from us until your paper changes its line." A delegation of other advertisers urged the repudiation of an editorial criticizing the criminal syndicalism law and its use in labor disputes. Other observers asserted that all this was merely the reaction of a healthy American country town to the intrusion of racketeering unionism and communistic lawlessness. And the Union, on its side, was charged with using all manner of threats and intimidation to line up the Maytag workers with the C. I. O.

There was no middle ground. And today in Newton, four months after the reopening of the plant, it is still perilous to try to be a neutral. . . .⁴

³ Ramige was a minister who was discharged as a result of his actions in connection with the strike. They were fairly mild—he asked the community to look at both sides; but he was pro-union. In Palmer, *op. cit.*, p. 10, Palmer and Lane say of him and his discharge: "With the best will in the world to understand and help the under-dog, he did not pay equal attention to both sides in a bitter controversy. If a minister chooses to 'hob' with labor he must also 'nob' with management or else be in danger of appearing to be partisan. . . . His church trustees

lost courage when confronted with serious shrinkage of income because certain large givers disapproved of any minister who had anything whatever to do with a labor organization such as the C. I. O."—C.R.

⁴ By Frank W. McCulloch.—C.R.

II. POLICE AGAINST PICKETING

If anyone, including unionists, uses violence, the expectation is that a policeman will arrest the offender, that he will be tried in court, and that if found guilty he will be fined or imprisoned or both. This experience may deter him from using violence again and it may deter people who learn of it from ever using violence.

Sometimes policemen beat or shoot people in the process of arresting, either because they resist arrest, or because the policeman gets excited, or because he or his chief figures that a beating or shooting is a better deterrent than is due process of law. If the pres-

ence of the police overawes people, and preserves the peace, it is partly because of the fear of arrest and partly because of the fear of the night-stick.

If a man or woman is brought to court, lawyers may raise questions about whether it is legal or constitutional for him to be tried there. This sort of question is taken up in later sections. The present section (and the next one, on "Private Force against Picketing") treats of the simple power of the police to control persons who are about to violate some law or who may be suspected of planning to do so.

EVENTS OF THE SAN FRANCISCO LONGSHORE STRIKE¹

In today's papers (July 11, 1934) Mayor Rossi of San Francisco is quoted as saying, in reply to President William Green's telegraphic criticism of police tactics in the waterfront strike:

"The police of San Francisco were never the aggressors. They fought only to protect life and property and to suppress rioting and violence."

An unofficial observer, with little immediate prospect of personal gain or loss through the victory of either party to the contest, I spent the week of July 2-8, upon the San Francisco waterfront—except when, with the strikers, I was driven from it by the police; and in the interests of fairness and of truth, I am obligated to deny, directly and from my own experience, the declaration of the Mayor.

On Monday I sat upon a box-car top, opposite Pier 32, during that long and tense silence which attended the threatened—and postponed—opening of the port. As everyone knows, nothing happened that afternoon.

On Tuesday I was at the corner of Japan and Townsend, soon after 9 A.M., when the police decided to extend the forbidden zone back to Second Street. We retreated unhurriedly and without enthusiasm—but without any protest save that of the cigar stand clerk who didn't want to lose business, and without any sign of physical resistance. Unhindered, we went down to the foot of Brannan, opposite Pier 34.

There the police intermittently allowed us into the roadway and drove us back to

the railroad tracks. Each time we obeyed orders. A man beside me unhesitatingly surrendered a stick of kindling, the largest and most destructive weapon I saw in a striker's hands then or thereafter. Seeing the tear gas flying at Second and Brannan, during the afternoon, I ran thither; but the excitement had died away already, and no one seemed to know how or why it began. I do know that it was a full block away from the rice scattered from one truck, and three blocks from the overturned truck with the empty cartons.

We stood around this last, at Fourth and Townsend, for an appreciable time before the police decided to move us. This they did by riding us down, brandishing their nightsticks in their hands. Brickbats were thrown at them from the vacant lot—with uniformly bad aim, and only by young boys whom older men promptly ordered to desist.

The *Chronicle* for Saturday, July 7th, carried a sketch map captioned "Where Bloody Riots Raged." The corner of Bryant and Main bears the inscription, "Strikers start hostilities. Police use tear bombs." It happens that I had been standing at that particular corner, on Thursday morning, for a full half hour before hostilities began. Everything was quiet—so absurdly quiet that, in conversation with a member of the Social Problems Club of the University of California, I had wandered to the point of telling him how Calvin Coolidge became Honorary Moderator of the National Council of Congregational Churches!

Suddenly a police automobile, with a board over the lower half of its windshield, drove up. We looked at it, rather idly curious—and found the tear gas bombs hurtling through our irregular ranks. We scurried up Main Street—an extremely rough and difficult terrain to negotiate. At the top of the block we

¹ George P. Hedley, *The Strike as I Have Seen It* (An Address before the Church Council for Social Education, Berkeley, California, July 19, 1934) (pamphlet, San Francisco: Conference for Labor's Civil Rights, 1934), pp. 2-5. Mr. Hedley wrote the following statement on the basis of notes that he had made during the days of his observation of the longshore strike in San Francisco in 1934; a strike which later, for three days, became a city-wide general strike. Cf. "The San Francisco General Strike," in Chapter 3.—C.R.

stopped; an obliging truck driver gave transportation to the old man who had had a direct hit from one of the bombs, and the back of whose head was a bloody mass. *There had been no provocation, verbal or physical; no warning was given us; and there was no retaliation.*

Half an hour later, at Main and Harrison, we were treated to an identical performance, with the same lack of aggression on the part of the strikers, the same lack of warning on the part of the police, and the same lack of any resistance to the attack. This time I saw the firing of the tear guns, the aim being at the level of our heads or lower. Looking toward Beale Street, I saw rocks flying through the clouds of gas; there were none thrown in my vicinity, either before or after the bombs were fired at us.

When the board-protected car had gone I sauntered back toward Harrison, picked up a bomb which had dropped just beside me during our retreat, and whose contents I had sampled thoroughly, and walked down Harrison to Spear Street. The reason for our being allowed to return to the corner of Main and Harrison is as obscure as that for our being driven from it.

That spot is marked, on the *Chronicle* map, "First gun battle." I had always supposed that the expression "gun battle" inferred the possession and use of guns on both sides; *I have yet to see a gun in the hand of a striker*—or to hear of a policeman who received a bullet wound.

The *Chronicle* is unquestionably right in marking these two episodes as the opening of Thursday's hostilities; and it is as unquestionably wrong in its assertion that the strikers started them. It follows that Mayor Rossi's declaration that "the police of San Francisco were never the aggressors" is an absolute misrepresentation of the facts.

The rest of the day's story was a repetition of this technique. During the morning I retreated a total of seven blocks un-

der police attack; in no case did I see any violence initiated by the strikers, and in no case was there any retaliation except the occasional throwing of brickbats and stones. I have talked with four men who were at Steuart and Mission when the shooting occurred there, and have a detailed, circumstantial narrative from two of them; I have talked also with the father of one of the men shot in the Seaboard Hotel, with one of the employees there, with a man who was in the I. L. A. headquarters when that place was attacked, with two men who told me independently of seeing two officers, and then "several," beating a single young striker into unconsciousness in front of the Harbor Emergency Hospital, and with innumerable others, of various occupations and points of view, who were present during the "fighting." The report is uniformly that the police were the aggressors, and that the reason for any given attack was never apparent to those who watched it or to those who bore its brunt.

So exactly does this coincide with my own observation that I am led to conclude, not only that Mayor Rossi is inaccurate in saying that "the police were *never* the aggressors"—as has been said above, I *know* that to be untrue—but also that the actual story of "bloody Thursday" would show that the police were *always* the aggressors. "They fought," says Mr. Rossi, "only to protect life and property and to suppress rioting and violence." The facts are that they damaged property at the Seaboard and at half a dozen other points along the Embarcadero; that they destroyed life at Steuart and Mission, if nowhere else; that repeatedly they were guilty of initiating violence; and that such rioting as occurred was the direct product of their own aggression.

The contention that there has been no violence since the arrival of the militia, adduced by the Acting Governor in defense of his action in calling them out, is

susceptible of a reading quite different. There was no violence for several hours

before they arrived. In fact, *violence ceased when the police stopped attacking.*

THE CHICAGO MEMORIAL DAY INCIDENT

On the afternoon of Memorial Day, May 30, 1937, in the city of Chicago, Ill., 10 people received fatal injuries when city police dispersed a large group of striking steel workers and their sympathizers who were marching in the direction of the plant of the Republic Steel Corporation near Burley Avenue and One Hundred and Sixteenth Street in that city. This encounter occurred 4 days after the outbreak of a strike of union employees of the corporation and while picketing was in progress in front of the plant. In addition to the fatalities, none of which was suffered by the police, approximately 90 members of the group were injured (30 by gunfire) and 35 police sustained injury.

The cause of and responsibility for the encounter has been the subject of sharp dispute by the police, the union, and the public. The police have charged the demonstrators with a conspiracy to capture the Republic Steel plant by violent means and assert that the casualties were a regrettable but necessary incident to their efforts to disperse a riotous mob. The union, on the other hand, accuses the police of a brutal attack upon a group of citizens in the exercise of their constitutional right peacefully to assemble and picket. . . .

The union leaders all testified that the Sunday meeting was called to protest police interference with picketing. Each

of them categorically denied, however, that the march which succeeded the meeting itself had been planned or anticipated. They would have us believe that it was a spontaneous expression from the crowd. We cannot accept this conclusion. Clearly, a meeting whose purpose was to vindicate the right to picket would not have accomplished the purpose for which it was called had it not been followed by a vigorous effort to establish a picket line. The evidence of preparations for such an effort is clear. Placards affixed to sticks and bearing slogans attacking the policy of the company and the police or calling attention to Mayor Kelly's statement on picketing were available at the meeting. These were obviously not intended for the edification of those who attended the meeting. They were designed to be carried in a parade. . . .

Ralph Beck, the *Chicago Daily News* reporter who covered the meeting, . . . described the substance of the remarks of Weber and Fontecchio [union speakers] as follows:

Senator LA FOLLETTE. What was the subject of the speakers that you heard?

Mr. BECK. They were principally attacks on their own—they were principally attacks on the police, indirectly in this respect, and they would identify East Chicago and Indiana Harbor, Indiana, as being a part of the United States, but that Chicago, apparently, to quote "Was a part of Germany or Italy. The mayor told us we could picket, and the police won't let us through. Mayor Kelly gave us his decision publicly, and we have a right to peaceful picketing, and the police are not letting us through; and in Indiana Harbor and in East Chicago the mayor is giving us his full cooperation, and the police are cooperating with him."

Senator LA FOLLETTE. Was that the substance of everything you heard?

Mr. BECK. That was the substance of everything I heard; yes. There was a remark about steel barons and "We will win the fight" and

¹ U. S. Senate, Committee on Education and Labor, Subcommittee on Violations of Free Speech and the Rights of Labor, *The Chicago Memorial Day Incident* (75th Congress, 1st session, Senate Report No. 46, Part 2) (Washington: Government Printing Office, 1937), pp. 2, 9, 11, 12, 13, 14, 16, 17, 19, 20, 21, 27-28, 31, 33, 34, 38-40, 41. The incident occurred at the beginning of the "Little Steel" strike of 1937. The investigation as well as the report were made by the subcommittee, usually called the La Follette Committee.—C.R.

"Organization is what we need if the fight is to be won."

Senator LA FOLLETTE. During the time you were there, did you hear any one of the speakers exhorting the crowd to storm the plant?

Mr. BECK. No; not at all.

Senator LA FOLLETTE. Was there any discussion by the speakers of trying to establish their right to picketing in some of the plants?

Mr. BECK. No; that right had been given them by the mayor. . . .

The police produced before this committee a trunk full of iron bars, wooden clubs, bottles, stones and other implements which were gathered at the scene upon the conclusion of the encounter and which they assert had been abandoned by the marchers as they fled. Photographs of these weapons were carried in the Chicago press and appear in the printed record of the proceedings before the Senate Post Office Committee. They bear the caption "Used in a Riot at Republic Steel Corporation, May 30, 1937." The police rely, in great part, on this collection of dangerous instruments to establish the character of the march which took place after the meeting.

But the testimony of the police themselves completely destroys the probative value of these exhibits. Sergeant Lyons, of the police force, aptly described the physical condition of the prairie before Memorial Day as follows:

. . . Senator, this place here, the prairie, has been cultivated in some spots, such as you see a little garden there, a black spot representing a little garden, etc., and there are rocks, there are railroad tracks, there is everything in the vicinity, and limbs of trees and pieces of wood. . . .

Senator LA FOLLETTE. Did you observe any arms of any description in the possession of the marchers?

Mr. BECK. Some of them had clubs and pieces of rusty iron pipe.

Senator LA FOLLETTE. Would you say that a large percentage of them had clubs and pipes?

Mr. BECK. I saw only about 35 or 40 myself.

Senator LA FOLLETTE. Did you observe the line carefully?

Mr. BECK. Yes, I made it a point to look for it. . . .

The testimony of the police is remarkable for its insistence that no discussion took place between them and the marchers. The marchers presented the appearance, they testified, of wild disorder and answered the orders of the police to disperse with foul language, taunts, and threats. . . .

The evidence of the Paramount news reel is decisive of the question here considered. The camera filmed continuously up to the very moment of the encounter. Mounted on a truck behind the police lines it was in a position to photograph the faces in the crowd which confronted the police. The camera swings from one end of the line to the other, the film contains a number of close-ups, and clearly portrays the general aspect of the crowd during the moments preceding the clash. It is apparent that the marchers were engaged in earnest and heated debate with the police. Fingers point to placards on which slogans demanding the right to picket are inscribed. Arms are flung in the direction of the plant gate, indicating the point at which the establishment of a picket line is demanded. That there was profanity, we have no doubt. But there is no evidence of physical threats or of the frenzied disorder which the police describe. . . .

The union was familiar with the extent of the police force stationed at the plant, both through the observation of its pickets and through the encounter which had occurred on the preceding Friday. In addition, testimony shows that the company employed between 20 and 30 armed guards stationed at the gate of the plant, and had armed an additional 50 to 100 employees with hatchet handles. These facts must likewise have been known to the union, both from the pickets stationed at the plant gate and from the personal knowledge of the Republic employees who were out on strike. In addition, the evidence shows that there were possibly as many as 1,300 men still in the plant, a

fact of which the union must also have been aware.

Under these circumstances it would have been suicidal to attempt to storm the gate with an unorganized procession, including many women and children, possessed of a few clubs, stones, and pieces of pipe. This conclusion was reached by Commissioner Allman himself. He testified as follows:

Senator THOMAS. Their [the police] objective then was to keep the crowd from getting into the gate?

Mr. ALLMAN. Yes.

Senator THOMAS. And the objective of the crowd was to get into the gate, is that right?

Mr. ALLMAN. Yes; I suppose that is so.

Senator THOMAS. If the crowd had attained their objective it would have been easy for them to have gotten the finks out, would it not?

Mr. ALLMAN. I doubt that very much.

Senator THOMAS. Why?

Mr. ALLMAN. Because I think there were more finks inside than in the crowd. They were armed just as easily, and could be armed just as easily. A mill naturally has a great many implements that could be used and it would simply be a massacre if they got inside, no doubt.

Commissioner Allman's conclusion is so obvious, from the facts, that we cannot but conclude that it must likewise have been apparent to the union. . . .

[Police Captain Mooney] testified that some 3 or 4 minutes elapsed between the time that contact was first made with the marchers and the moment of the outbreak of the encounter. He says that he commanded the strikers to disperse peacefully and in response was threatened by a man holding a club to which a meat hook was attached. . . .

[As the Committee summarized it, it was] Captain Mooney's testimony that the sequence of events was as follows:

1. Tear gas was thrown pursuant to his order.

2. Immediately thereafter he heard two or three shots fired from an undetermined source.

3. Immediately after the shots, missiles were thrown from the crowd.

4. The missiles were followed at a brief interval by 18 or 20 shots.

5. Two or three minutes thereafter 25 or 30 more shots were fired.

. . . the account of the incident drawn from the testimony of Mooney and Beck finds striking confirmation in a newspaper photograph (exhibit 1358) which appears to have been taken concurrently with the incidents which they describe and in the 4- to 7-second interval which the moving-picture camera failed to record. Beck, who himself appears in the picture at Captain Kilroy's side, fixes the time of the photograph as the moment during which the first police gun was fired into the air.

The photograph covers the eastern portion of the police line from the dirt road at the left to a patrol wagon parked behind the police lines just to Captain Mooney's right. It shows the crowd on the right already in full retreat, with the police advancing upon them. Just to the left of the patrol wagon is a stick or club such as that described by Beck, still in the air and falling into the ranks of the police. Further to the left of the patrol wagon, in the middle foreground, stands a police officer, gun in the air, apparently firing. In the center of the picture, in the ranks of the fleeing marchers, we see the fumes of a recently-detonated tear-gas bomb. To the left, another gas bomb has reached the peak of a smoking arc over the heads of the crowd. Officers in the vicinity of the patrol wagon are apparently dodging, whether to avoid unseen missiles or to escape the fumes of their own tear gas bombs it is impossible to determine. It is apparent that the marchers in the road, to the left of the picture, are just becoming aware of the activity of the police and the retreat of their fellows to the right. Some of those in the road are craning their heads to their left apparently attempting to ascertain the significance of the commotion on that side, while others are turning their backs on the police, seek-

ing to retreat or to worm their way back through the throng. A group of patrolmen closes on their left flank, and one policeman dashes in among them, his left arm outstretched and his baton raised. . . .

. . . The evidence discloses that all of the patrolmen on the scene made written statements which were filed with the police department several days after May 30. Commissioner Allman, upon the advice of Assistant State's Attorney Crowley, consistently refused to make these statements available to the committee. They were withheld for the reason, expressed by Assistant State's Attorney Crowley to members of the committee staff, that the State's attorney's office was engaged in considering a prosecution of certain of the union members and leaders for their part in the Memorial Day events; that the police statements formed a portion of the evidence under consideration by the State's attorney, and that to make that evidence available to the committee would be inconsistent with the practice and duties of the State's attorney's office.

In deference to the announced position of the State's attorney, the committee withheld subpoenas for these police statements, and although a request for their production was again made to Commissioner Allman when he appeared before the committee, they have not been made available at the date of the writing of this report. Whatever merit there may be in the State's attorney's position, it is obvious that it applies equally to the contemporaneous statements and to the affidavits dated almost a month after those statements were made. Yet the affidavits were produced while the statements have been withheld. The one contemporaneous statement (that made by Patrolman Woods) which happened to come into the committee's possession because of the fact that its maker was carrying a copy in his pocket at the time he appeared,

differs in material and, indeed, crucial particulars both from his subsequent affidavit and from his oral testimony. For these reasons we have concluded that the filed affidavits cannot be accepted as reliable statements of the events which they purport to recount and are not, therefore, entitled to consideration by the committee.

Before concluding our analysis of the police testimony one further point remains to be considered. If, as the police maintain, it was the intention of the marchers to break through the police lines and advance on the plant, we might expect a concerted effort on the part of the crowd to achieve this objective. Was such an effort made? . . .

The news reel, every frame of which was carefully studied, and the photographs taken at various times during the action, give the story in convincing detail. When gas was thrown into the east of the marchers' line the crowd in that section turned and fled, the police in full pursuit. The police then advanced all along the line swinging their clubs and shooting. The marchers in the front ranks in the center and to the west of the line attempted to escape, only to find their way barred by the mass of tangled bodies of those already shot or fallen in their haste to flee. The police surrounded the mass of fallen men and women, clubbing them as they attempted to rise. In groups of two or three they continued the pursuit, struck laggards to the ground and clubbed the fallen where they lay. Within a minute those marchers who could had fled the immediate scene. They reformed at a distance, stood throwing stones at the police for a few minutes, then straggled back to Sam's Place. Many remained stretched out on the field. The police returned to drag them off to patrol wagons and to search the field for weapons and missiles. . . .

. . . the evidence, photographic and oral, is replete with instances of the use

of clubs upon marchers doing their utmost to retreat, as well as upon those who were on the ground and in a position to offer no show of resistance.

To all this evidence the police responded with a general denial and a reiteration of the plea of self-defense. When confronted by photographic evidence which could not be ignored or explained away, they took the position that the incident in question represented only an isolated case of the use of excessive force which could be both understood and defended because of the passions aroused in the breasts of individual patrolmen by the conduct of the marchers. . . .

Our conclusion that the use of excessive force to disperse the marchers was deliberate is confirmed by a consideration of their care of the wounded. The uncontradicted photographic and oral evidence, corroborated by admissions of the police themselves, established that their treatment of the injured was characterized by the most callous indifference to human life and suffering. Wounded prisoners of war might have expected and received greater solicitude. . . .

Our conclusions with respect to the conduct of the Chicago police on Memorial Day have, in the main, been indicated in the body of this report. We shall limit ourselves to restating them briefly here.

1. Police Commissioner Allman stated to the committee that, in consonance with the opinion of the corporation counsel, he had no right to limit the number of pickets which the union might place in front of the plant and was required to permit picketing, irrespective of number, so long as it remained peaceful. Yet Captain Mooney, without consulting the commissioner, reached his decision to prevent the Memorial Day marchers from approaching the plant before he had any opportunity to observe their conduct and in the absence of any information as to their intentions.

The police defend this conduct upon

their *ex post facto* conclusion that the objective of the marchers was to force a violent entry into the plant. We have analyzed that defense in detail above and have concluded that it is groundless. We are of the opinion that the sole objective of the marchers was to picket in mass at the plant gate. To have done so would have created no traffic problem, since Burley Avenue is a dead-end street, terminating at the dirt road which crosses the prairie. The police have not urged that a mass picket line in front of the gate might have resulted in violence to nonstriking employees on their way to work, and from the record it appears that most, if not all, of those who remained at work were quartered within the plant. We are, therefore, of the opinion, after a careful consideration of all of the facts, that if the police had permitted the parade to pass down Burley Avenue and in front of the plant gate, under a proper escort, the day would have passed without violence or disorder and both the spirit and the letter of the corporation counsel's opinion, as construed by the commissioner of police, would have been complied with.

2. Were it to be conceded that Captain Mooney's determination to halt the marchers in the prairie was justified, proper police work clearly required careful preparation to accomplish this objective and disperse the demonstration with a minimum of violence. Yet we find that no one gave real consideration to the tactics of the occasion. The available manpower was doubled, but no auxiliary measures were taken. No preparations were made for the use of tear gas, and the second in command on the field did not even know that gas was available. Instead, a number of the police armed themselves with hatchet handles, apparently obtained from the plant, and the whole police detail was sent to the prairie with the most perfunctory instructions, if any.

3. We find that the provocation for the police assault did not go beyond abusive language and the throwing of isolated missiles from the rear ranks of the marchers. We believe that it might have been possible to disperse the crowd without the use of weapons. We think it clear that the gas used, pursuant to the extemporaneous order of Captain Mooney, would have been sufficient. But no time was allowed for a determination of the effectiveness of the gas in dispersing the crowd; guns followed almost instantaneously. From all the evidence we think it plain that the force employed by the police was far in excess of that which the occasion required. Its use must be ascribed either to gross inefficiency in the performance of police duty or a deliberate effort to intimidate the strikers.

4. We conclude that the consequences of the Memorial Day encounter were clearly avoidable by the police. The action of the responsible authorities in setting the seal of their approval upon the

conduct of the police not only fails to place responsibility where responsibility properly belongs but will invite the repetition of similar incidents in the future.

Robert M. LaFollette

Elbert D. Thomas

[An additional statement made by Senator Thomas ended with these words:] . . . the use of police officers in such a way that they seem to be allied with either side of a labor dispute destroys their effectiveness as peace officers representing the public. The moment they are used in defense of a given group they are associated in the minds of the opposing group as partisans to the dispute. Therefore, their very presence in unusual numbers invites disorderly incidents which in turn magnify themselves into clashes that produce death and beatings. Riot duty is the most difficult task which even a well-disciplined soldier has to perform. Those not trained in this work should not be available to either owner or laborer for the taking of sides in a labor dispute.

THE POLICING OF THE CHICAGO HARDWARE FOUNDRY STRIKE

A year after the Chicago police attacked the Republic Steel strike marchers in South Chicago, in 1937, a strike was called by the steel union in North Chicago. Our interest in the events at this juncture centers on the conduct of the Chicago police and its effect on the strikers and on the outcome of the strike. The account given here also reports some things that happened in court; the immediate authority of the police for their actions was the injunction which Judge Dady had issued.

The strike was six weeks old on July 18, 1938.

10 PICKETS JAILED BY ILLINOIS JUDGE

CHICAGO, July 18.—Judge Ralph J. Dady of the Circuit Court at Waukegan today

found ten north Chicago strike pickets guilty of contempt of court. The men, all affiliated with a C. I. O. union, were ordered to jail for periods of twenty to 120 days.

Other action in Lake County in connection with the strike at the Chicago Hardware Foundry Company included the return of indictments charging conspiracy and intimidation against twenty pickets, including those sentenced to jail, and the arrest of six persons alleged to have resisted deputies who tried to clear the street near the plant.

Judge Dady, in pronouncing the sentence for contempt, sharply criticized the attitude of Robert Wirtz, university graduate and volunteer leader of the strikers. Mr. Wirtz, who was never connected with the hardware plant, admitted that he had

¹ *New York Times*, July 19, 20, 24, 1938. Used by permission.—C.R.

advised the men to "go as far as they could" without actually violating an injunction against disorders.

Judge Dady read excerpts from some mimeographed sheets admittedly edited and distributed by Mr. Wirtz. One quotation was, "thugs are being recruited and armed by Judge Dady and Sheriff Doolittle."

"I do not think there is any fairminded person in Lake County who believes there is any excuse for these statements," Judge Dady said. "They were published only to stir hatred and misunderstanding and for no other purposes."

Mr. Wirtz was sentenced to 120 days. Two of the defendants were sentenced to thirty days in jail. They are Frank Rozak and August Pycke, who assisted in handing out the handbills attacking the court. The others, sentenced to twenty days, are Sam Runyan, Nick Vihos, Joseph Pankiewicz, Nick Marcinkus, Philip Lorek, Laverne Adams and John Machnich.

Attorneys for the men were granted two days to decide whether they would appeal. The lawyers, Lester F. Collins and Thurlow Lewis, said they would appeal the Wirtz case, but would consult the officials of the Committee for Industrial Organization before acting similarly on behalf of the others.

After court adjourned Mr. Wirtz returned to the picket lines and announced in a brief speech: "I would do it all over again for you men."

The other ten men indicted by the grand jury are Oakley Mills and Meyer Adelman, C. I. O. organizers; John Jarowski, Carnette Martin, Frank Bradke (president of the local union), John Gloss, John Iwanski, Frank Lapina, Andrew Pappas and Narcisso Lira.

Capiases for the arrest of all those indicted were turned over at once to Sheriff Doolittle.

There were more than 300 pickets about the plant in the morning when a number of foremen made a futile attempt to en-

ter. Later when Sheriff Doolittle ordered his deputies to clear a way for the office workers the pickets milled about. One deputy was struck on the head with an umbrella wielded by a woman and several were inconvenienced by a barrage of red pepper. There were no serious injuries, however, and the orders were carried out. Six arrests were made.

GAS ROUTS PICKETS IN NORTH CHICAGO

CHICAGO, July 19.—Policemen and Lake [County] Deputy Sheriffs, using tear gas bombs, routed C. I. O. strike pickets today who had blockaded the Chicago Hardware Foundry Company in North Chicago for seven weeks. The action was taken to enforce a court order that had been defied by the pickets.

An hour after the way was cleared 150 employes who had asked for a chance to work were back at their jobs. Sheriff Lawrence A. Doolittle announced that he was "through babying law violators" and would keep 100 men on duty to see that the workers were not molested again.

During the brief struggle outside the plant some of the pickets threw stones at the police. Others picked up the tear gas bombs and returned them. In a few instances there were hand-to-hand clashes, and deputy sheriffs had to use their clubs to overcome this resistance. No one, however, was seriously hurt.

One woman and five men were arrested and charged with disorderly conduct.

As soon as the plant had been opened Edward B. Sherwin, president of the company, announced that all employes who wanted to work were welcome back tomorrow, provided they accepted a 10 per cent cut in pay.

Announcement of the cut was the cause of the strike, and the strikers' leaders declared tonight that they would not compromise on the point.

There were some 300 pickets, including many women and children, in front of

the plant when the Sheriff's force of sixty gathered behind the factory fence. The strikers previously refused to allow foremen to enter. A plan of campaign was laid out by Deputy Sheriff Stanley Christian in direct charge. Leaders of the pickets, meanwhile, were urging their people to stand fast.

At 11:57 A. M. Deputy Frank Valenta, standing at the gate, yelled an order to the pickets to leave the premises under threat to use force. He was answered with jeers and catcalls.

At 12:02 P. M. the police moved out in a semicircular formation, with the convex side toward the crowd. Many carried tear and nauseating gas grenades. Stationed on the roof of a company building was a man with a long-range gas gun capable of throwing shells 550 yards. The prevailing wind favored the police.

The police moved in three waves. Ahead of the first one went the gas shells from the roof. Most of the pickets gave way slowly before contact was established. One demonstrator who wore a gas mask, gave battle. Another seized bombs in a wet cloth and hurled them back, putting one or two deputies out of the battle. The two men, a factory worker and an ex-convict, were among those arrested.

Several women in the crowd refused to retreat and bit and scratched at the police. One, who carried an American flag was pushed all the way to the deadline. Many unidentified pickets, it was said, seized stones from a near-by railroad siding and pelted the advancing forces with them. Some of the stones went wild and struck spectators, about 700 of whom were near by when the struggle started.

The deputies and policemen moved steadily forward. They used their clubs only when resistance was deliberate and strong. Although the regular policemen

and deputies had pistols, not a shot was fired.

Thirty minutes after the signal to advance was given the pickets were all pushed back one-eighth of a mile to a police deadline. A few remained there. Sheriff Doolittle said that about 125 bombs were exploded in the march. Two of the Sheriff's men reported slight injuries.

Soon after the clash, and before the plant gates were cleared, Sheriff Doolittle arrested Robert Wirtz, leader of the strike for several weeks. He was indicted Monday on a charge of conspiracy. Unable to make bonds, he was still in the Lake County jail at Waukegan tonight. So was Narcisso Lira, another defendant.

Meyer Adelman, a C. I. O. organizer, who had been active in the strike, was seized at Elkhart, Ind., today. He was indicted with Wirtz, but fled to avoid arrest in Lake County. When seized he was urging a small group of C. I. O. men at the Goshen branch of the Chicago company, to form a picket line as a protest against what had happened in North Chicago. Adelman said he would resist extradition.

FOUNDRY STRIKE SETTLED

WAUKEGAN, Ill., July 23 (AP).—Settlement of the strike at the Chicago Hardware Foundry Company in near-by North Chicago was announced today by Harry E. Scheck, Federal Department of Labor conciliator.

Mr. Scheck said that the strikers would return to work Monday under a 5 per cent wage reduction.

Next week a working contract is to be negotiated, he said, with a further 5 per cent reduction to become effective Aug. 1.

The company had ordered a 10 per cent wage cut, the issue over which the strike was called June 6 by local 1192 of the Amalgamated Association of Iron, Steel and Tin Workers, a C. I. O. affiliate.

III. PRIVATE FORCE AGAINST PICKETING

As we have seen in the previous section, unionists complain that the regular public police forces are often "on the side of the employer." They make this complaint when the laws against violence are enforced against them, but they make it especially in those cases in which the law is not enforced equally against them and the employer's agents, or in which the unionists are intimidated by the police instead of merely being prevented from using violence.

To the extent that the regular police are not impartial—are on the side of the employer—they are, in a sense, a "private force." Company agents who are sworn in as deputies are pretty clearly a "private force"; so are other forces mentioned in this section,

such as "coal and iron police" and the police of company towns. Strike guards or "strikebreakers" who are not deputized are most obviously a private force. In some cases the employer relies on a collaboration between deputies and private agents, as in Harlan County. Intimidation by company agents—deputized or not—ought to be prosecuted. However, a company may often be able to count on the police to co-operate to the extent of overlooking illegality, as in the *Ford* and *Red River* cases, quoted from below. In some cases a government official may prefer to eliminate "strikebreakers" and have policing done exclusively by public officers, as in the Alabama situation reported on below.

DEPUTIZED STRIKEBREAKERS

[During the Williams and Clark fertilizer strike at Roosevelt, N. J., in January 1915, guards sent by a detective agency were sworn in as deputy sheriffs.] The strikers had been given permission by the plant manager to inspect incoming trains for strikebreakers.

"According to the stories of all the witnesses except the deputies," said the *New York Times* of January 19th, "the train halted, the strikers were permitted to inspect it, and they were leaving it cheering because they had found no one arriving to take their places, when forty deputies under Thomas Ravalinsky of New Brunswick rushed from the fertilizer plant out on to the railroad property, firing revolvers, rifles and shot guns as they ran.

"The strikers stood aghast for a moment. As many among them screamed and fell wounded, the others fled into the marsh which surrounds the plant, and the deputies, according to witnesses, pursued, firing again and again until

every striker who could move was two hundred feet away or more.

"Opposite them the guards waited, weapons ready. Between the two groups lay wounded men, some of whom tried to creep toward the strikers, while cries and groans arose from the marsh."

Two strikers were killed. Sixteen others were shot in the back. The deputies set up a cry that the first shots had come from the strikers, but there were none to bear out their story.

"These deputies lie if they say the strikers fired at them," said Policeman J. I. W. Dowling of Carteret, an eyewitness. "How could the strikers shoot when they had no weapons? They were thrown into a panic by the attack of the deputies, some taking to the highlands and others to the marshy lands. It was those who ran through the marsh that suffered. The deputies butchered them. It is impossible to describe how they slaughtered those unarmed, defenseless men. The strikers were shot and beaten and then shot again. The deputies kept firing until their leader signalled them to stop and then they returned to the Williams & Clark property without attempting to aid the injured men groaning all over the marsh."

¹ Edward Levinson, *I Break Strikes! The Technique of Pearl L. Bergoff* (New York: Robert M. McBride and Company, 1935), pp. 148-49. Used by permission.—C.R.

SPECIAL POLICING IN INDUSTRY:

Honorable Gifford Pinchot,
Governor of Pennsylvania.
Dear Governor Pinchot:

On February 9, 1934, you wrote to each member of this Commission asking him to serve on a commission "to investigate the disorders at Ambridge on or about October 5, and other recent disorders growing out of the company-paid deputy sheriff system." . . .

The Commission held a public hearing in the high school auditorium at Ambridge on March 10, and heard a full account of the disorders which occurred there in October, 1933. At this hearing all the parties concerned offered testimony, and the sheriff and the strikers were represented by counsel who were of great assistance to the committee. W. D. Craig, Esq. of Aliquippa represented the sheriff, and Jacob Seligsohn, Esq. of Pittsburgh represented the strikers.

Ambridge is a borough on the Ohio River, eighteen miles northwest of Pittsburgh, having a population of 20,227 according to the 1930 census, of whom nearly a third are foreign born. Of the foreign born population, two-thirds are from Poland, Italy, Czechoslovakia and Yugoslavia. More than half of the workers are employed in the six steel mills. Across the river is the Borough of Aliquippa, dominated very largely by the Jones & Laughlin Steel Co. which has a large plant there.

Until the summer of 1933 no union had secured an appreciable number of members in any of the Ambridge steel plants. The plant owners have the open shop policy which characterizes the steel industry. Last summer the Steel and Metal Worker's Industrial Union, an independent union not affiliated with the Amer-

ican Federation of Labor, began to organize the employes of several of the plants, and by the end of September had enrolled a large membership.

At the end of September the union presented to one of the plants a demand for recognition of the union and for higher wages, and there followed almost immediately a cessation of work by the union members of several contiguous plants. By Tuesday, October 3, all of these plants were picketed by strikers. The only company which tried to keep its plant open was the Spang, Chalfant & Co., Inc., which before the strike employed about 1200 men. On Tuesday, Wednesday and Thursday there was mass picketing at the Spang, Chalfant & Co., Inc., plant, principally at the entrance which lies just inside of the line dividing the Borough of Ambridge from the adjoining township.

As soon as the strike began, the sheriff swore in a large number of company deputies and placed them in the picketed plants. While the sheriff kept control of these deputies in person or by lieutenants, they were working in the plants of companies from whose pockets their salaries were to come. Early on Tuesday morning there was a fight between the pickets and a large group of men attempting to enter the plant to work, and only a few of the latter got through. Some of the would-be workers were badly beaten.

By Wednesday the plant was virtually in a state of siege. Even the health officer could not get in, and there was a delay in getting a sick man out of the plant to the hospital. There is no doubt that the pickets exceeded their legal rights, that there was mass picketing with violence, and that it was almost impossible for a worker to enter the plant. The borough police did not attempt to maintain order on the picket line so as to make possible the admission to the plant of men who wanted

¹ Pennsylvania (State), Department of Labor and Industry, *Special Bulletin No. 38*, Report to Governor Gifford Pinchot by the Commission on Special Policing in Industry (Harrisburg, 1934), pp. 7, 11-14, 16-20, 22.—C.R.

to work, as well as of supplies. It was not until Thursday morning that the borough council authorized the burgess to employ additional police.

Sheriff O'Loughlin, the chief peace officer of Beaver County, determined to handle the situation. On Monday evening he had talked to a state police corporal stationed with a few men in Beaver County and had learned that these men had been ordered back to the barracks in Butler County. The sheriff testified that he asked John G. Marshall, Esq., the county solicitor, if he would talk to the Governor, which Mr. Marshall did between 8:00 and 9:00 A.M. on Thursday, October 5, informing the Governor of the situation. The Governor took the matter up with the Superintendent of State Police. The sheriff then testified "After getting no satisfaction, I would say, from Governor Pinchot as to whether he would send us men or not, we decided that we had to take some action ourselves," without waiting to hear from the Governor further, and without making any other effort to obtain the State Police, the sheriff on the same morning began to swear in 150 new special deputies. Many of the deputies were obtained through the American Legion; at least fifty employees of the Jones & Laughlin Steel Co. across the river from Ambridge. These deputies formed an undisciplined force, with no time for training.

The sheriff marshalled his 150 deputies at Aliquippa, transported them in automobiles to a point across the river from Ambridge, divided them into squads of four, each in charge of an ex-service man, equipped them with four tear gas guns, twenty buckshot guns, two machine guns, riot sticks and revolvers, and marched them to the Spang, Chalfant & Co., Inc. plant. The equipment was obtained by the sheriff on Thursday morning.

Among the marchers was the district attorney of Beaver County, though he held no commission as a special deputy

sheriff. Obviously it was highly improper for him to take part in a fray out of which criminal prosecutions were likely to arise. A few days after the fighting the district attorney took a large number of ex parte statements, all tending to show that the strikers were in the wrong. These statements were offered in evidence at the hearing. Although they have some value as evidence, we note, in considering them, that leading questions were addressed to many of the witnesses, and that the district attorney himself was engaged in the fighting.

Arriving near the plant with his deputies between 2:30 and 3:30 in the afternoon, the sheriff crossed the street by himself and made a last effort to persuade the pickets to withdraw. The strikers retorted defiantly and the sheriff then told his men to take the strikers' clubs away. Within a few seconds tear gas was fired, clubs began to fly, and then buckshot was fired. The pickets were almost immediately overwhelmed by the deputies. A number of pickets and spectators received buckshot wounds, some of them in the back. The deputies grew excited and fired quite unnecessarily at fleeing men. The machine guns, although loaded, were not fired and we do not believe that any revolver was fired. The sheriff did not give the order to use buckshot and admits that it was unnecessary to use it. Later, all his men denied having fired buckshot. However, one could scarcely expect to arm a hundred and fifty hastily gathered men with dangerous weapons and to find when the battle was over that none of those weapons had been used.

After fighting, one man was found shot dead three blocks from the scene of the trouble. He was neither a striker nor a deputy. No one knows how he was killed; it is not even certain that he was killed in the fighting. . . .

After the battle the town was policed to some extent by special deputies. There was some evidence of tyrannical behavior

THE BORDERS OF VIOLENCE

by these deputies. Testimony was given of violent interference by company deputies with people going to the funeral of the man killed at the time of the fight. This testimony was contradicted by the police authorities. There is no doubt that the strikers and their families deeply resented the presence of the deputies and were afraid of them.

Burgess Caul caused his borough police to raid the headquarters of the strikers on Thursday afternoon, to arrest several leaders of the strike without warrants and to carry off the records and the cash found there. A day or two later the borough chief of police arrested Hill, one of the strike leaders, while riding in a bakery truck, although he had no warrant for his arrest. Hill spent several days in the Beaver County jail until he was released on a habeas corpus. These acts by the borough authorities were in flagrant violation of the constitutional rights of citizens.

During the trouble the sheriff swore in two hundred and forty-eight special deputies all told. According to the testimony of the county controller, the county paid the salaries of these deputies at six dollars a day, and the steel companies in Ambridge reimbursed the county to a total amount of \$24,811.40. The county also paid from \$5,800 to \$6,000 for special weapons and ammunition. Of the salary payments, \$11,807 came from the Spang, Chalfant & Co., Inc., whose plant was the center of the disturbance. The American Bridge Company paid \$5,934, although its plant is a mile or more from the scene of the trouble and it had no strike and no picketing. Special deputies were furnished to the American Bridge Co. to protect its buildings and its large street, railroad and river frontage against anticipated attack. The balance of the \$24,811.40 was paid by the companies whose plants adjoined the Spang-Chalfant plant, in each of which there was a strike or a shut-down.

Counsel for the strikers contended that the sheriff deliberately chose to provoke a

battle in order to strike terror to the hearts of the union men and so to break up the unionization of the steel mills. The sheriff's explanation was that he was determined to end the mass picketing, because he believed that a dangerous element controlled the strikers and that order could be restored in no other way.

The result of the sheriff's acts was to terrorize the strikers and to hinder efforts to unionize the steel plants. When a body of a hundred and fifty men, heavily armed, including the district attorney of the county marches under the lead of the sheriff to a pitched battle with men armed with clubs, there is an overwhelming show of force which inevitably lead the defeated workers to conclude that the public authorities and the employers are in league to crush them. When it appears later that the military expedition has been financed by the employers, the workers may reasonably assume that the conclusion is confirmed.

We conclude that the picketing of the Spang, Chalfant & Co., Inc., plant was violent and illegal and that police measures were necessary. Order should have been maintained by a strictly public and unprejudiced police force. The State Police could unquestionably have maintained order, at the same time permitting peaceful picketing which would have allowed workers to enter the plant without molestation.

Without intending to condone in the least the violence of the strikers, we point out that it was undoubtedly increased by the prompt appearance of the company deputies at the inception of the strike. The possibility of such an event as we have described at Ambridge strongly supports an indictment of the system of privately paid deputy sheriffs. . . .

1. *Company Deputies.* (Special deputy sheriffs paid by private persons or corporations.)

A policeman, whether he is called by that name or is called a special deputy

sheriff, should be an unprejudiced public servant, paid out of public funds and directed by public officials. . . .

WE RECOMMEND legislation prohibiting any private person or corporation from paying directly or indirectly the salaries of deputy sheriffs or the cost of their uniforms or equipment. . . .

2. *Roving Deputies.* (Special deputy sheriffs paid by the counties).

The sheriff of each county has the power to commission any number of special deputies as a *posse comitatus*. When this is done in order to apprehend a dangerous criminal there can be no objection to it. So also if there is an unusual disturbance which cannot be controlled by the ordinary police authorities, it is proper for the sheriff, in the first instance, to depend on special deputies so long as they are paid by the county and not by private citizens. It is noteworthy that it was company deputies, and not county-paid deputies, who were involved in the most serious disorders in Fayette County in the summer of 1933.

During the disturbances of 1933 in Fayette County, Sheriff Hackney called upon a large number of "roving deputies" who were paid by the county and were employed to keep the peace on the highway. Since their activities were directed entirely against the United Mine Workers' pickets, these deputies were of course regarded by the strikers as enemies. In the absence of State Police, we do not see how else the sheriff could have handled the situation at the outset. He was bound to keep the highways clear, and had to rely for that work on undisciplined men suddenly selected. To forbid any sheriff from commissioning special deputies would make it impossible for him to keep the peace at certain times.

The cure lies not in forbidding the employment of county-paid deputy sheriffs, but in creating proper safeguards and supervision in their selection, and in permitting the governor, through the state

police, to supersede the authority of the sheriff in serious emergencies, so that trained men will be in charge and the responsibility of the county authorities will end for the time being.

To abolish the company deputy system is to strike at by far the most serious present evil. If all special deputy sheriffs must be paid by the county, they will be responsible to all the citizens of the county. Further, sheriffs will naturally turn to the state police to control serious industrial disturbances.

WE RECOMMEND legislation providing that deputy sheriffs shall be selected only by the sheriff, with the approval of the county commissioners, with pay and mileage fixed by the county commissioners and paid from county funds. Each deputy should subscribe to an oath of office which should be recorded immediately.

3. *Coal and Iron Police.* (Industrial Police).

The Industrial Police, generally called the coal and iron police, have three attributes which especially distinguish them from watchmen guarding their employers' property. They have the power to arrest on a warrant; their employers are not liable for their unlawful acts unless done in pursuance of direct orders; and, above all, they have the title and the uniform of a police officer and an authority which springs from the Commonwealth itself.

Beginning with 1865, statutes have been enacted permitting private persons and corporations to pay and direct their own police, who hold commissions from the governor. . . .

On February 10, 1929, John Barkoski of Tyre in Allegheny County was beaten by drunken coal and iron policemen so cruelly that he died. Immediately the long impending storm broke. Representative Michael A. Musmanno, now a Common Pleas judge in Allegheny County, promptly introduced a bill to curb the powers of the coal and iron police. This bill was backed by organized labor and

was intended to deprive the coal and iron police of all powers except the power to guard property. However, the bill was so amended in committee as to make it unsatisfactory to labor, and the same fate befell a similar bill introduced by Senator William D. Mansfield of Allegheny County.

The Mansfield bill as amended was finally enacted on April 18, 1929, to provide for "industrial police," superseding all the former acts dealing with coal and iron police. . . .

This act improved the law in only two important respects: It required every industrial policeman to have been a bona fide resident of the Commonwealth for one year and it required a surety bond for each appointee.

On June 30, 1931, Governor Pinchot revoked all the outstanding coal and iron police commissions, which then totaled 1,015. Sixteen companies accounted for 880 of these, as follows:

Bethlehem Steel Company	129
Jones & Laughlin Steel Corporation	24
Pressed Steel Car Company	13
American Bridge Company	17
Pittsburgh Steel Company	15
Phila. & Reading Coal & Iron Company ..	14
Lehigh Valley Coal Company	16
Pittsburgh Steel Products Company	10
National Mining Company	10
Carnegie Steel Company	380
H. C. Frick Coke Company	61
Westinghouse Electric and Manufacturing Co.	76
Pittsburgh Coal Company	21
Hudson Coal Company	66
Pittsburgh Crucible Steel Company	14
The Pittston Company	14
	880

WE RECOMMEND that the Industrial Police Act of April 18, 1929, shall be repealed. . . .

(Signed) FRANCIS BIDDLE,
JOHN J. KANE,
PAUL S. LEHMAN,
J. W. MADDEN,
SHIPPEN LEWIS,
Chairman

LIMITATIONS ON PRIVATE-PUBLIC POLICE

Some States have adopted safeguards against the dangers of private usurpation of public authority. The measures taken by these States have, in general, followed three separate approaches. [1] A provision which is common in the statutes of some is that which prevents public officers from deputizing nonresidents to act as peace officers. These statutes, in the most part, were adopted following the depredations committed by the Pinkerton private police, who were sent about the country in bands, to break strikes on behalf of large railroad, mining, and steel com-

panies. A typical statute was adopted in Pennsylvania on May 29, 1893, following the notorious Homestead incident, during the strike at the Carnegie Steel Corporation. This statute required all special deputies to be citizens of the Commonwealth.

[2] More recently, in response to widespread complaints against the character of the persons who had been appointed to serve as special deputies, some States have begun to establish standards to insure the selection of reputable persons to act as peace officers. The State of Kentucky, for example, forbids the appointment of any person to serve as a special police officer who—

has ever been convicted of or who is under indictment for a crime involving moral turpitude under the laws of this Commonwealth or of any other State or of the United States. [1938]

¹ U. S. Senate, Committee on Education and Labor, Subcommittee on Free Speech and the Rights of Labor, *Private Police Systems* (76th Congress, 1st session, Senate Report No. 6, Part 2) (Washington: Government Printing Office, 1939), pp. 215-16. The investigation as well as the report were made by the subcommittee, usually called the La Follette Committee).—C.R.

The Kentucky law also recognizes that persons who have hired themselves out as guards during labor disputes are unfit to serve as public peace officers. This conclusion is abundantly confirmed by the evidence in the record of this committee. Provisions similar to the Kentucky law have been enacted by the Commonwealth of Pennsylvania [1937].²

[3] Of more immediate concern to the subject of this report is recognition of the misdeeds which have resulted in so many tragic incidents of violence, perpetrated by privately paid police officers. Several States have taken steps to prohibit the deputization of men on private pay rolls. In West Virginia the law forbids private compensation to deputy sheriffs, whether made directly or indirectly, for the performance of their official duties. Similar provisions are included in the Kentucky law. A more elaborate provision was made in the Pennsylvania statute which reads:

2. . . The Pennsylvania law also requires a sheriff to select deputies from a list of qualified individuals which has been posted in a public place for 10 days prior to their appointment therefrom.

§ 192c. *Private gifts or payments to police officers prohibited; state not to accept gifts of military supplies.*—No State police, sheriff, deputy sheriff, constable, deputy constable, detective, police or other peace officer of this Commonwealth or of any political subdivision thereof, (collectively referred to in this act as "officers"), shall perform, directly or indirectly, any official services or official duties for any person, association or corporation, or receive, directly or indirectly, any compensation, gifts or gratuities from any person, association or corporation during the period of his official services: Provided, however, That nothing herein contained shall prohibit such officers from serving writs and other legal process as now authorized by law. Any compensation payable to any officer for official duties and services shall be paid only out of the public funds, to the amount and in the manner prescribed by law. Gifts, donations, and gratuities of any nature whatsoever made by any person, association or corporation to the Commonwealth, or any political subdivision thereof, or any official or agent thereof, shall not constitute public funds within the meaning of this section.

The Commonwealth, or any political subdivision thereof, or any official or agent thereof, shall not accept as a gratuity, gift or donation any arms, ammunition, military supplies, tear gas or equipment or supplies or articles of a similar character from, nor shall any such gratuity, gift or donation be made by, any person, association or corporation. [1937]

HARLAN COUNTY, KENTUCKY, 1934-38¹

On December 8, 1934, William Turnblazer, president of District 19 of the United Mine Workers of America was authorized by the chairman of the Southern Division of the Bituminous Coal Labor Board under the N. R. A. to accompany a code authority inspector to Harlan County to investigate the amount owed the miners by the Harlan Wallins Coal Corporation for overtime, pursuant to the decision rendered by the board on October 17, 1934.

¹ *Ibid.* The La Follette Committee's condensation of the testimony before it on "Private Police Systems" in Harlan County (pp. 17-114) included the following incident (pp. 71-72) and the following summary of findings (pp. 208-10) which apply also to the years before 1934, though 1934 is the first date mentioned. Republic Steel's private police are described in pp. 116-206.—C.R.

Conditions in the mines operated by the Harlan Wallins Coal Corporation were summarized in findings in a decision rendered by the Bituminous Coal Labor Board on October 17, 1934.

All the evidence presented to the Board sustained in full the contention that the workers in the mines at Verda and at Molus are working from one to three hours above the seven hour day, and in one instance even more than three hours, with only seven hours pay for day workers. That there is what is known as the "clean-up" system and workers are required to remain until the "clean-up" is completed, regardless of the hours spent. There was also testimony to the effect that there were times when the miners worked more than five days a week.

It was testified that no checkweighman representing the workers is allowed at either Verda or Molus. It was further testified that a notice calling for a meeting to elect a checkweighman

at Verda had been torn down by foremen or watchmen of the Corporation, and that at least two men were discharged for posting such notices. Other workers expressing a desire for checkweighman had been beaten by the deputy sheriffs.

The witnesses testified that a feudal condition obtains at these mines and that it is dangerous to discuss organization or the question of electing a checkweighman. The affidavits of those not connected with the Union also stated that it was generally understood that the miners of the Harlan-Wallins Coal Corporation were not free to express themselves in any way, and that they were intimidated in their movements even when off the Corporation property. The testimony showed that men applying for work at the mines of the Corporation were often beaten and run off the property, particularly, if there was a suspicion they were in favor of the Organization.

Relying on the authority granted by the Bituminous Coal Labor Board, Mr. Turnblazer and a group of 10 other men drove into Harlan town and registered at the Lewallen Hotel. Scarcely had the union men entered the hotel when the organized gangs in Harlan County began to converge on Harlan town. All the deputies and thugs were mustered together, including men even from as far as Benham, company town operated by the Wisconsin Steel Co. Merle Middleton was there with Pearl Bassham's thug gang in full force.

"Thug" Johnson painted a vivid picture of the scene at the hotel. Forty or fifty deputies "from different companies" congregated about the hotel lobby. Some of them registered in the hotel, taking rooms adjacent to those occupied by Mr. Turnblazer and his party. Merle Middleton went away to fetch the sheriff but stationed his men to keep watch on Mr. Turnblazer, explaining, according to "Thug" Johnson, that "we are going to take him out and bump him off tonight." The high sheriff entered later with Merle Middleton, and after surveying the scene turned and left.

While the deputies and thugs milled about in the lobby of the hotel, Pearl Bassham entered and looked over the crowd.

He saw "Thug" Johnson and winked at him. Testifying about the incident, Mr. Bassham acknowledged that his employees were there and that their expenses were paid by the company. He said:

Merle Middleton handled those men at that time, and if we paid for them, it was paid through him.

Mr. Turnblazer was trapped in his hotel room. The deputies set off giant firecrackers outside his room. They dragged their knuckles across the door, threatening to break in and take the union men out. As night drew on his position became increasingly precarious. Shots were fired in the street.

Mr. Turnblazer succeeded in calling his union headquarters outside of the county and asked them to reach the State officials. The Governor issued the following order:

Captain Diamond E. Perkins, two officers and forty-two men of Company "A," 149th Infantry, Kentucky National Guard, are hereby ordered on active duty for the purpose of maintaining law and order in Harlan County, Kentucky, and specifically for the purpose of protecting the lives of William Turnblazer and other members of the United Mine Workers of America who are now held prisoners in the Lewallen Hotel by the Sheriff of Harlan County and his deputies.

At midnight the National Guard arrived and escorted Mr. Turnblazer and his group out of the county.

The union officials abandoned further efforts to visit the county. In April 1935, the contract with the Harlan County Coal Operators' Association expired. It was not renewed.²

[The LaFollette Committee found: 1. Of 60,000 persons in Harlan County, 45,000 lived in company towns. There are 12,000 coal miners. 2. Most coal mines are absentee-owned. 3. A number of mines are "captive" mines, selling their coal to large suzerain corporations.]

² That contract had been—if anything—a brief interlude in the anti-union life of the association, prompted by the appearance of the N. R. A. As will be seen below, another agreement was signed in 1938, again after intervention by Washington.—C.R.

4. Lynch, Ky., is the company town of the United States Coal & Coke Co., a subsidiary of the United States Steel Corporation. Everything in Lynch, except the schools and churches, is owned and controlled by the United States Coal & Coke Co. The roads, houses, stores, and theaters are all part of the company property. The residents of Lynch own no private property except their own personal belongings. People in Lynch are permitted to occupy their homes only so long as they are employed by the company. Lynch is the largest community in Harlan County, with a population of 12,000.

5. In Lynch, Ky., the private guards of the United States Coal & Coke Co. are the only law-enforcement officers. Although exercising public functions, the company police act as agents for the company, subject to the direction of the manager of the mines and the captain of the company police. The captain of police reported to and received instructions from the superintendent of police of the H. C. Frick Coke Co., of Pittsburgh, Pa., which is also a subsidiary of the United States Steel Corporation. In normal times the company police force consisted of 13 men.

6. In Lynch, Ky., the company police force of the United States Coal & Coke Co. used its authority to deny to the residents of the town the rights of free speech and assembly, and the right to entertain guests of their own choosing. These guests were objectionable only insofar as they were suspected of being affiliated with a labor organization. The company police force undertook to prevent organizational efforts of the United Mine Workers after the passage of section 7 (a) of the National Industrial Recovery Act, in 1933. They refused union organizers admission into the town; they interfered with efforts to address the miners on the public highways; they confiscated union literature; they shadowed and threatened organizers, not only in Lynch, but even outside Harlan County.

7. In Lynch, Ky., the company police of the United States Coal & Coke Co. persecuted residents of the town and visiting labor organizers in open defiance of the national labor policy formulated by the Congress. Conditions of repression continued after the passage of the National Labor Relations Act, in 1935, as long as the United States Coal & Coke Co. remained hostile to the right of its employees to organize and refused to deal with the union. In 1938 these conditions were ameliorated after the company abandoned its opposition to collective bargaining and signed a contract with the union.

8. The coal operators in Harlan County formulated a common labor policy through their association, the Harlan County Coal Operators' Association. In 1935, 26 of the 44 coal companies operating in Harlan County were members of this association. Except for the Black Mountain Corporation, affiliated with the Commonwealth Edison Co. of Chicago, Ill., the captive mines were not members of the association. The association was organized in 1916. The revenue of the association is obtained through a tax which is levied upon every ton of coal produced by each member.

9. The dominant influence in the Harlan County Coal Operators' Association were the companies operated by absentee interests. In 1935, 17 of the 26 active members of the association were under absentee control. In the same year the association received a total income of \$41,730, of which \$27,305 was contributed by companies subject to absentee control.

10. The coal operators in Harlan County acting in concert through the Harlan County Coal Operators' Association, engineered the suppression of civil liberties in Harlan County with the connivance of the high sheriff, Theodore R. Middleton, who was in office from January 1934 through December 1938.

11. The high sheriff of Harlan County surrendered to the coal operators the au-

thority of his office by using his power to appoint deputy sheriffs selected, paid by, and under the control of the operators. From January 1934 to April 1937, High Sheriff Theodore R. Middleton appointed a total of 379 deputy sheriffs only 3 of whom were regularly employed by him out of public funds. All the rest were apparently on private pay rolls, principally those of the coal operators.

12. Ben Unthank, "field man" of the Harlan County Coal Operators' Association, had at his disposal the associations' large slush fund, with which to reward deputy sheriffs who followed his leadership "in connection with resisting the efforts to organize the county." When miners in the county attempted to organize themselves into unions the association doubled the assessment on its members to raise funds in order to resist the organization drive. The assessments were doubled for a period of several months following the passage of the National Industrial Recovery Act, in 1933, the National Labor Relations Act in 1935, and once again from January 1937 through the time of the investigation conducted by this committee, March, April, and May, 1937.

13. Many Harlan County deputy sheriffs on the pay rolls of coal operators and their association had lengthy criminal records. Forty-three had been convicted of felonies and 64 had been indicted on one or more charges of murder, assault with intent to kill, and robbery.

14. Without fear of interference by the Harlan County law-enforcement officers, some of the coal operators maintained private bands of strong-armed men, composed of nondeputized supervisory employees. These private gangs terrorized union members within the coal camps and throughout the county at large, acting as auxiliaries to the force of privately-paid deputy sheriffs. The most notorious of these bands was the "thug gang" supported by Pearl Bassham, vice president and general manager of the Harlan Wal-

lins Coal Corporation, and directed by one of his deputy sheriffs, Merle Middleton, a cousin of the high sheriff.

15. From 1933 to 1937, the deputy sheriffs, together with the private "thug gangs," maintained a reign of terror directed against miners and union organizers of Harlan County. This was done with the knowledge and consent of certain of the coal operators, who acted both individually and in concert through the Harlan County Coal Operators' Association. Rewards to the deputy sheriffs and other "thugs" for perpetrating acts of violence were made by the Harlan County Coal Operators' Association through Ben Unthank. Ben Unthank fled the process of this committee and remained in hiding throughout the investigation. The secretary of the association destroyed its financial records and books of account to frustrate the investigation conducted by this committee.

16. The Harlan County coal operators, through their deputy sheriffs and "thug gangs," continually harassed miners and prevented them from attending union meetings, from speaking at union meetings, and from distributing union literature. They even forced out of Harlan County, the minister of the Corbett Memorial Methodist Church, of Harlan town, because he had protested in his sermons against violations of civil liberties in Harlan County.

17. In Harlan County, the deputy sheriffs and members of the "thug gangs" repeatedly fired on union organizers, from ambush on public highways, in open country, and even in their own homes. They kidnaped and assaulted union officers, and dynamited the homes of union organizers. They discharged tear gas bombs in a public hotel where union men were guests, endangering not only their lives but also the lives of the other guests in the hotel, including women, cripples, and small children. In numerous instances they seriously wounded union

men by shooting them with dum-dum bullets. Their terroristic acts culminated in the murder on February 9, 1937, of Bennett Musick, 17-year old son of Marshall A. Musick, union organizer and resident of Harlan County for 14 years.

18. The Harlan County coal operators subverted and corrupted the office of high sheriff, in the years 1934-37, through many extraordinary financial favors rendered to High Sheriff Theodore R. Middleton, who entered upon his term of public office as a man of small means and in 3 years amassed a fortune of over \$100,000. The coal operators also extended financial favors to the Commonwealth attorney, Daniel Boone Smith, and to County Judge Morris Saylor.

19. The conspiracy on the part of the coal operators to suppress civil liberties in Harlan County, abetted by a venal county administration, succeeded in preventing the miners in Harlan County from exercising their right of self-organization. The reign of terror carried out in

furtherance of this conspiracy was directed against workers who were exercising the rights guaranteed by section 7 (a) of the National Industrial Recovery Act and by section 7 of the National Labor Relations Act.

20. Since the committee's investigation in March, April, and May, 1937, the Harlan County Coal Operators' Association has signed a contract with the United Mine Workers of America, effective on September 1, 1938. The latest report received by the committee from Harlan County seems to indicate that at least for the time being peace has been restored in Harlan County. . . .³

³ The 1938 agreement followed a federal trial of a group of coal operators for conspiracy to deprive miners of the right to organize freely which is stated in the National Labor Relations Act. The jury disagreed. From May to September 1939 Harlan County was again the scene of a serious struggle, in which militia were called in. Another agreement was finally signed. See Emanuel Stein and others, *Labor Problems in America* (New York: Farrar and Rinehart, 1940), pp. 567-68 --C.R.

STRIKEBREAKING SERVICES

In investigating commercialized services offered to employers in time of strike, this committee entered a field frequently touched upon in the past by other congressional committees and other branches of the Federal Government.² This committee's approach to the question, however, differed from that of earlier investigations. Whereas former committees touched upon the activities of strikebreaking agencies or strike services only in con-

nection with specific strikes or labor situations which they were authorized to investigate, this committee approached the furnishing of strike services as a commercialized function available to employers upon call. This business has existed since the 1880's, and was found to have continued, with little change, down to the period of this investigation.

SECTION I. THE BUSINESS OF FURNISHING STRIKE SERVICES

The committee makes the following findings concerning the commercial aspects of the business of furnishing strike services:

(a) Many detective agencies engage in the business of furnishing and supervising strikebreakers, strikeguards, and propagandists, missionaries or street operators. Most, if not all of the detective

¹ U. S. Senate, Committee on Labor, Subcommittee on Free Speech and the Rights of Labor, *Strikebreaking Services* (76th Congress, 1st session, Senate Report No. 6, Part 1, Jan. 26, 1939) (Washington: Government Printing Office, 1939). Part 1 condenses into 222 pages the testimony before the subcommittee (the La Follette Committee). The brief summary which is quoted here is from pp. 135-37. Cf. "Deputized Strikebreakers," at the beginning of this section and "Strikebreakers Superseded," at its end.—C.R.

² A list of 34 government documents (1882-1937) is given *ibid.*, pp. 139-48.—C.R.

agencies engaged in the business of furnishing these three classes of strike employees, or any one of them, also offer the service of spying on the union affiliations and union activities of employees. The three functions of furnishing strike services, labor espionage, and industrial munitions are related in purpose, and are sometimes carried on by the same detective agency.

(b) Some employers' associations, committed to a policy of antiunionism, furnish strikeguards or strikebreakers as a part of their services to assist employers to fight against the recognition of unions.

(c) A considerable body of men in our great industrial centers are available for, and seek employment in, strike situations. These are the men recruited by detective agencies or employers' associations to serve as strikebreakers, strikeguards, or missionaries. They go from strike to strike and some of them make this work their vocation. An underworld profession of strikebreaking exists.

(d) Detective agencies and employers' associations furnishing strike services recruit strikeguards and strikebreakers through strike lieutenants, leaders of the strikebreaking profession, who have a wide acquaintance among those available for strike work. If they can establish a clientele of employers, strike lieutenants sometimes set up in business for themselves.

(e) The profits made by detective agencies from strikebreaking are enormous, ranging from 25 to 100 per cent.

(f) Such profits are increased by the prevailing attitude of antiunion employers toward strikebreaking services. In time of strike even large and carefully run corporations seem to experience a collapse of proper accounting procedure, and vast sums are turned over to the leaders of the strikebreaking class without question or investigation.

(g) Taking advantage of the opportunities offered by such financial laxity, and

by the racketeering character of their vocation, professional strike followers cheat employers through padded pay rolls, deceit, and other forms of graft. It is such sums of money and such opportunities for fraud that constitute the lifeblood of the strike-breaking profession and maintain it in existence.

SECTION 2. THE PURPOSE OF COMMERCIALIZED STRIKE SERVICES

The committee finds that strike services are offered by detective agencies and employers' association not so much for the purpose of assisting employers to protect property and maintain operations during strikes but rather for the purpose of destroying unions and the processes of collective bargaining. This conclusion does not question the right of the employers to engage watchmen to protect their premises, nor the right permanently to replace employees for good cause by other skilled and competent workmen. These acknowledged rights of the employer, however, cannot be invoked to justify employment of the strikebreakers, strikeguards, and missionaries furnished in the usual course of business by detective agencies, strikebreaking agencies, or employers' associations for the following reasons:

(a) The strikebreaker furnished as a part of strike service by the above mentioned agencies, is, in most cases, not a qualified workman but an incompetent mercenary, posing as a workman for the purpose of breaking strikes. He usually receives compensation higher than that of the regular employees, and is discharged after the strike.

(b) The strikeguard furnished by the agencies mentioned above, is not a man trained and qualified for police and patrol duty. He is, for the most part, a specialized kind of ruffian, a "regular fink" well versed in violence, often dishonest, and sometimes a gangster.

(c) The propagandist, missionary, or

street operator furnished by the organizations mentioned above, practices deception and deceit, and often performs in the role of agent provocateur or spy.

No employer who has accepted the principle of collective bargaining in good faith can consider using such persons against his employees. Not only do such persons tend to provoke violence and disorder, but their purpose is to discredit and destroy instruments of collective bargaining and make amicable settlement of disputes an impossibility. Through their acts of intimidation, coercion, and provocation such persons violate the rights of free speech and free assembly and the freedom of association of employees. Furthermore, during the period of this committee's investigation, the use of such strike services, and the business of purveying them, violated the policy of labor relations enunciated by the Congress.

SECTION 3. RELATION BETWEEN STRIKE SERVICES AND STRIKE VIOLENCE

The committee finds that commercialized strike services have constituted an important cause of violence occurring in strikes in which they have been used, for the following reasons:

(a) Commercialized strike services tend to produce violence and disorder. Such

violence comes partly as a result of the natural hostility and resentment of workmen against the use of industrial mercenaries, but is more directly attributable to the activities of professional strike followers and the employers who use them.

(b) In most cases professional strikebreakers or strikeguards have a pecuniary incentive to create and maintain a state of disorder and violence in the strike on which they serve. Detective agencies have been known to create or feign violence in order to extend and increase the services which they render.

(c) In some cases employers have directed detective agencies to perform acts of violence, or have instigated such acts, or have made their commission inevitable. This has been done either to discredit strikers because of such acts, to break their morale by the use of physical force, or to create a disorderly situation of such proportions that the armed intervention of the State will be required to suppress it.

(d) Professional strikeguards and strikebreakers are worse than useless in preventing or policing acts of lawlessness or violence by strikers. Instead of controlling or pacifying such situations, they embitter them and add further fuel to the flames.

NATIONAL LABOR RELATIONS BOARD *v.* FORD MOTOR COMPANY

U. S. Circuit Court of Appeals (6th Circuit). 1940.

114 Fed. (2d) 905.

SIMONS, Circuit Judge. . . .

The riot of May 26, 1937, during which a number of officers of the union, and others, including men who may fairly be said to come within the definition of "employees" within the meaning of Section 2 of the Act, were found to have been viciously and brutally assaulted by a number of Ford service men while attempting to distribute literature, forms the basis for one of the principal unfair labor prac-

tices found by the Board to have been committed. The inference drawn by the Board as to its cause and origin is said to have no substantial basis in the facts disclosed by the record when these are projected against a background of labor terrorism which the Board failed [to consider] and of which we are urged to take judicial notice.

There is evidence that a group of U. A. W. men, known as the Ford Or-

ganizing Committee, had arranged to distribute union leaflets to workers at the respondent's River Rouge plant, and that from 50 to 75 persons, the majority of whom were women, were selected to pass out the handbills. They arrived at the plant on the afternoon of May 26, 1937, an hour and a half before the change of shifts. The union leaders proceeded to gate 4 where entrance to the plant is by means of an over-pass across a public highway. Photographers employed by Detroit newspapers, informed of the proposed distribution, were present and took the pictures of the group which are in evidence. Presently appeared a number of Ford service men, who announced that the over-pass was Ford property and forcefully, if inelegantly, directed immediate departure therefrom. The union group without belligerent response turned to leave, whereupon the assault upon them took place. Other members of the union in the vicinity of gate 4, were likewise subject to attack. Newspapermen, attempting to take pictures, were pursued by service men intent upon destroying the films or plates, and attempted distributions at gates 9, 10 and 1 encountered like opposition. The next day there was an unprovoked assault upon the U. A. W. men driving by the respondent's plant, in which a Ford service man participated. From the evidence credited by the Board thus condensed, placed against a background of Ford's previously announced anti-union views, the Board found that the attacks upon union members and sympathizers were attributable to the respondent, and that it thereby interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, such rights, of course, including the right of self-organization; to form, join and assist labor organizations; and to bargain collectively through representatives of their own choosing.

If the events of May 26 and 27 thus

delineated by substantial evidence credited by the Board, point directly or by reasonable inference to assaults upon union organizers, with the purpose of preventing the distribution of union literature, its seizure, and the driving away from the plant gates of those selected to distribute it by persons acting under the authority of the respondent, or with its sanction or approval, then undoubtedly the respondent interfered with the rights of its employees guaranteed to them by the National Labor Relations Act, and such interference is an unfair labor practice sustaining the appropriate remedial provision of the Board's order. The respondent, however, paints a different picture and requires for it a setting of the condition of the times which, it says, it was not permitted by the examiner fully to develop, was not considered by the Board, of which the court may take judicial notice, or declining to do so, should grant its motion to remand the case to the Board for the taking of additional evidence.

The setting in which the respondent places the riot is the industrial turmoil which began late in 1936 when a wave of sit-down strikes became a national phenomenon with its incidence most conspicuous in the automobile industry in Michigan. The protracted sit-down strikes in the plants of General Motors and Chrysler began in December, 1936, and continued through March, 1937, and by them it was demonstrated that a small minority of employees could, with the aid of outsiders, forcibly take control of an industrial plant, stop production, and throw all of the men normally employed, out of work. It was also demonstrated that the regular agencies of law enforcement would, in such situation, be unable or unwilling to take the drastic measures required to evict the strikers so that normal legal remedies were not available to owners of seized property. It is urged that there were repeated public threats

by U. A. W. and C. I. O. leaders to inaugurate a sit-down strike in the respondent's plant, and that the Board should have recognized that the violent and lawless methods of the U. A. W. at other plants might have led some of the respondent's 80,000 employees to take active measures in opposition, and so would reasonably explain the violence committed upon union organizers upon grounds other than respondent's opposition to unionization, and its pursuit of a purpose to interfere with employees' rights of self-organization. It says that the Board's complete disregard of this setting gives an entirely distorted impression of the riot, as well as of other alleged unfair labor practices, and that the evidence in support of them could not properly be appraised, or its probative force be determined, without consideration of the background of the sit-down strikes, the threat to extend them to the plant of the respondent, and the preparations to resist such strikes there made.

That we may judicially note an industrial phenomenon so widely publicized and so much discussed as was the forcible and unlawful seizure of industrial property by groups of ill-advised and determined men in the period under consideration, we have no doubt. The court may not close its eyes to what was referred to at the time by the then Governor of Michigan, as "the greatest industrial conflict of all times." That such seizure of property was illegal was never doubted by the thoughtful and the well-informed. Its illegality is now specifically adjudicated by highest authority. *N. L. R. B. v. Fansteel Metallurgical Corp.* [see Chapter 5]. No one who lived through the period can ignore the terror which this lawless labor technique imposed not only upon the automotive industry and its non-union employees fearing loss of their jobs, but upon all employers of labor in Michigan, including manufacturers, retail establishments, hotels, public utilities, and others.

Nor may the fact be forgotten that normal, legal remedies were then of no avail in the area to protect private property against unlawful seizure, or to restore its owners to possession when unlawfully seized. Humane reluctance to plunge the State into an orgy of violence and bloodshed stayed the hand of authority—who shall say unwisely?

In this situation it may be assumed that the respondent was justified in the precautions it took to protect its plant from seizure, either by employees from within, or by others from without. It had reason to fear that there would be an attempt to seize the gates of the River Rouge plant and to invade it for the purpose of staging a sit-down strike. It increased the number of its service men stationed at each gate on May 26. The gates were either locked or kept in such position that they could be locked at a few moments' notice. At gates which could not be locked, Ford trucks were strategically placed so that, if necessary, they could be driven into position to block the road against an invading motor cavalcade. Expecting that trouble, if it came, would most likely be at gate 4, principal entrance to the plant, a group of 50 to 75 men of the service department, was kept in readiness to repel invasion at that point. Other precautions need not be detailed.

The conclusion is, however, inescapable that the preparation of the respondent to prevent the seizure of its property was more than adequate to repel an attempted seizure which the approach of 50 to 75 union organizers, mostly women, might signify even to the most fearful, as imminent. Even assuming that the respondent had reasonable grounds to believe that the ostensible purpose of the organizers to distribute union literature was but a blind to conceal an attempt to stage a sit-down strike, the assault upon them was not necessary for the safeguarding of the respondent's property, nor was it provoked by the union men. The finding of

the Board that it was attributable to the respondent, is sustained by evidence that the assailants on the over-pass included two foremen of the River Rouge plant and a member of the service department, and that other service department employees took more or less prominent parts at other points, but also by credible evidence of the interview between newspaper men and Everett Moore, chief of the respondent's service department, prior to the riot.

The reporters were expecting trouble and appeared on the scene with photographers. They interviewed Moore as to whether they would be able to take pictures without interference, and asked whether the respondent was going to do anything to prevent the distribution of literature. They were told that the service department would take no action to prevent distribution but that some loyal employees might resent it, and that if they did it wouldn't be the fault of the Ford Motor Company. The reasonable inference from this evidence, which the Board drew, was that the head of the respondent's service department knew that the ostensible purpose of the union men was to distribute literature; that he expected it would be met with violence; and that he would take no action to prevent it, indulging the belief that if it occurred it would not be the fault of the Ford Motor Company. It is clear, from the evidence, that the service men were under the immediate direction and control of Moore; that production employees were not, at the time, in substantial number in proximity to gate 4 since it was still an hour or more before the afternoon change of shifts; and that though trouble was anticipated, not only were no steps taken to avoid it, but it was precipitated and continued by men directly subject to Moore's orders. In this situation the respondent may not deny responsibility whether the doctrine of *respondeat superior* is applicable, in strict literalness, to

such cases, or not. See *Consumers Power Co. v. N. L. R. B.* 113 Fed. (2d) 38, 44, announced by us June 27, 1940. Nor is it enough to say that the event was but a normal manifestation under provocation of human behavior, since it was anticipated and could easily have been prevented. The finding that the assaults upon the union organizers constituted an unfair labor practice, must be sustained, and the remedial provisions of the order, based upon such findings, enforced. This is without regard to the fact that there was no finding by the Board as to the particular employees who were restrained or coerced in the enjoyment of their right to self-organization, since ultimate findings by necessary implication include intermediate fact findings. *N. L. R. B. v. Nat'l Motor Bearing Co.*, 104 Fed. (2d) 652 (C. C. A. 9). There is at least substantial evidence of the direct intimidation of Llewellyn, an employee of the respondent who attempted to distribute leaflets near gate 1, and it has been held that one instance is enough to justify an injunction. *N. L. R. B. v. Remington Rand, Inc.*, 94 Fed. (2d) 862, 869 (C. C. A. 2), certiorari denied 304 U. S. 576, 585. . . .¹

* * * *

One element in the plan of the Ford Motor Company which has just been considered was the company's certainty that the public police of the locality (Dearborn, Michigan) would not interfere with the violence of the company agents. Another case in which public officials failed in their duty, apparently because of their relation to the company, is seen in the *Red River Lumber* decision, from which extracts are quoted below. In

¹ The court ordered several Ford men reinstated who had been discharged for union activity. It refused to enforce that part of the Board's order which forbade the company to circulate anti-union literature. This part of the order had been very actively used against the Board by its critics. The Board did not appeal from this decision of the circuit court upholding "free speech for employers." The company appealed from the parts of the Board's order which the court did enforce, but the Supreme Court refused to review the decision, February 10, 1941.—C.R.

neither case was any charge of non-feasance brought against the officers in question.² The

² A court recommended that the Dearborn police department discipline certain officers, but nothing was done about this. Carl Raushenbush, *Fordism* (New York: League for Industrial Democracy, 1937).—C.R.

chief legal result in the *Ford* case was an order from the National Labor Relations Board, supported by the Supreme Court about three years later, directing the *company* not to repeat its behavior, on pain of contempt charges. In the *Red River* case, the company was in fact cited for contempt of the court order.

NATIONAL LABOR RELATIONS BOARD *v.* THE RED RIVER LUMBER COMPANY

U. S. Circuit Court of Appeals (9th Circuit). 1940.
109 Fed. (2d) 157.

WILBUR, Circuit Judge:

[The order of the N. L. R. B.,] in the main, has been complied with. Certain sections of the order relating to the maintenance of law and order in the community of Westwood, California, required by our enforcement order of February 6, 1939, are alleged to have been violated by the respondent. . . .

As a basis for the charge of contempt of court by the respondent, it is alleged that from the date of the order to the date of the petition the respondent, by its officers, agents and supervisory employees, have incited, assisted and encouraged the organization of vigilante or other groups among the general public in the community of Westwood, California, for the purpose of interfering with, restraining and coercing its employees in the exercise of their rights guaranteed them by Sec. 7 of the National Labor Relations Act . . . and have failed to make reasonable efforts to discourage and deter breaches of the peace committed against the respondent's employees on account of their affiliation with or activity in the I. W. A.¹; has failed and neglected to require its officers to refrain from influencing or attempting to influence its employees to

join, or not to join, labor organizations. In order to disclose the power and authority of the respondent to prevent or control the organization of vigilante groups and to discourage and deter breaches of the peace, petitioner makes a detailed statement of occurrences at Westwood involving preservation of law and order.

It is alleged by petitioner that S. W. Macdonald is the manager of the industrial relations of respondent, having general supervision over the hire and discharge of the employees; that he is also a deputy sheriff of Lassen County, and a deputy constable of Westwood township; that E. A. Welder, the head of the auditing department of respondent, is also a deputy sheriff of Lassen County; that K. R. Walker, secretary of respondent, is also a deputy constable of Westwood Township; that A. V. Bangle, employed by the company at a salary of \$165 monthly as a safety steam water inspector, is also the constable of Westwood Township, receiving a salary of \$100 per month therefor. It is alleged that Bangle was employed by the company as a safety steam and water inspector to influence and control his action as constable. It is alleged that at all times after February 6, 1939, all the constables of Westwood Township and all the deputy sheriffs of Lassen County, residing in the settlement of Westwood, have been employees and agents of the respondent; that the

¹ Lumber and Sawmill Workers' Union, Local No. 53, International Woodworkers of America, affiliated with the Committee of Industrial Organization, called the "I.W.A." throughout the petition herein.

only peace officer other than these employees charged with the duty of maintaining law and order in Westwood was the justice of the peace. It is alleged that none of the public officers above mentioned are members of the I. W. A., and that these officers participated in violence directly against the members of the I. W. A. on July 13, 1938 (before the issuance of the enforcement order). It is alleged that the respondent has a rule by virtue of which it discharges employees who commit assaults and batteries and other acts of violence or misconduct, whether or not the same occur at or near the sawmill or logging operations of respondent.

It is alleged on information and belief that certain employees of respondent, on January 6, 1939, (before the date of the enforcement order) had uttered threats against the members of the I. W. A. and that the company had knowledge of these threats; that from February 6, 1939 [the date of the Court's order], to May 1, 1939, the respondent permitted members of the "Brotherhood"², including officials and supervisory employees of respondent, to gather in public places in Westwood and utter threats and offer violence to members of the I. W. A.; that the respondent knew that to permit such unlawful assemblies to gather and remain in public places would incite, assist and encourage the organization of vigilante and other groups for the purpose of destroying the I. W. A.; that members of these unlawful assemblies were unarmed and could have been dispersed had the respondent, by its officers and agents, ordered them to disperse and procured the arrest of any of

their number or threatened to procure their discharge from the employ of respondent, pursuant to rule, but that respondent, by its agents and officers, failed and neglected to do so. This failure is charged as a violation of our order. It is alleged that on February 18, 1939, the respondent, by its officers and agents, procured, encouraged and assisted a large gathering of disorderly persons consisting for the most part of employees of the respondent and members of the "Brotherhood" to gather around a certain meeting place in the settlement of Westwood wherein members of the I. W. A. were conducting meetings.

It is alleged that S. W. Macdonald, the deputy sheriff who was manager of the industrial relations department of the respondent, witnessed an assault upon a member of the I. W. A. by Fred Lake and failed to take any action to procure the arrest of Lake; that when constable Bangle requested a large crowd of disorderly persons to disperse, Macdonald, in a loud voice, encouraged members of the gathering to remain where they were, which they did. . . .

There is no allegation of misconduct by the company in the petition which is supported by the affidavits filed therewith other than the allegation that certain peace officers who were also employees of the company, had done or refrained from doing certain acts which as peace officers they should have refrained from doing or should have done. In the absence of showing that they were in fact directed by the respondent it must be presumed that they were performing their duties as peace officers and not as employees of the respondent where the situation demanded official action by such peace officers. (See *Red River Lumber Co. v. Cardenas*, 95 Fed. [2d] 157). . . .

² Local 2836, United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, referred to in the petition herein as the "Brotherhood."

STRIKEBREAKERS SUPERSEDED¹

[In 1934, at the time of the national textile strike,] Bergoff told off the reigning power in Georgia in no equivocal terms.

"Why, Governor Talmadge practically gypped me out of a hundred thousand dollars," Bergoff roared. "And he offended my men. They were all ready to go to work and we would have had that strike cleaned up in no time. Then he sends the militia in."

Here Bergoff paused for expressions of extreme scorn that would have made Governor Talmadge and the dauntless militia of the State of Georgia rise in the swift attack of outraged Southern dignity.

¹ Edward Levinson, *I Break Strikes: The Technique of Pearl L. Bergoff* (New York: Robert M. McBride and Company, 1935), p. 2. Used by permission —C.R.

"The militia! Any one of my boys is worth ten militia-men any day. W. D. Anderson, President of the Bibb Manufacturing Company, called me all the way from Georgia to tell me that; and he's chairman of the Southern Textile Manufacturers' Association. The governor said we was scouring Atlanta for machine guns. That's the bunk. We don't want no machine guns. We always go prepared. Why, I shipped some tear gas down there by airplane. Then on Monday the governor roasts us and runs my men out."

Bergoff turned to the larger aspects of his difficulty.

"Always somebody trying to play politics. Governor Talmadge runs my men out and gets a cheer from the strikers. Then he calls the militia in and fixes himself up with the manufacturers. . . ."

IV. THE ANTI-TRUST LAW AND VIOLENCE

Violence may be met, legally, not only by arrest and criminal prosecution under one or more general or special laws, but also by the aggrieved company bringing a civil suit. A company which can show criminal behavior can of course claim damages if that behavior has reduced the company's profits. If the firm can claim damages, it will probably be able also to get an injunction which, like the criminal law, warns the union to behave; it is much more likely to choose to ask for an immediate injunction instead of threatening a slow damage suit. Labor injunctions have the advantage not only of speed but also of being likely to forbid even activities which merely border on intimidation, and perhaps to forbid peaceful activities which seem to be associated with violence or intimidation.

All three methods (criminal indictment, injunction suit, and damage suit) are specifically authorized in the federal anti-trust laws, which may be invoked where "restraint of interstate commerce" can be shown.

Why have companies' lawyers sometimes chosen to sue under the anti-trust laws (assuming that they could claim some sort of

connection with interstate commerce)? One reason is that connecting a union with the anti-trust laws makes the public think it is a monopoly. Another is that the anti-trust laws permitted the company to claim triple damages and this possibility made a damage suit seem more likely to be worth the investment of legal expenses. Another reason (which would apply also to cases taken to the federal courts on the grounds of diversity of citizenship) is that federal judges have on the average been stricter with unions than have state judges. Federal courts are thought to be faster, to command more respect; they can follow defendants across state lines, and can cover several states by means of one lawsuit, which means less expense.

The indictments, injunctions, and damage suits under the anti-trust laws from 1890 to 1930 were described by Edward Berman in his *Labor and the Sherman Act*.¹ The act was used more against combinations of labor than against combinations of capital, though the discussion at the time of its passage was

¹ New York: Harper and Brothers, 1930.—C.R.

almost exclusively devoted to the latter and Berman concluded that Congress never meant to include the former.²

There are two conflicting theories about the court decisions applying the Sherman Act to labor-union activities. (1) The act gives the federal courts jurisdiction of some labor disputes—the ones which restrain interstate commerce (and judges will differ as to which ones do so). Having jurisdiction, the federal court may punish under the rules of the act any union actions which it considers basically wrong. Violence is one sort; it is of course punishable under state law also. A boycott, for instance a refusal to handle non-union materials, is another; this may or may not be considered unlawful by state courts. One way of putting this theory is to say that the combination to restrain trade is an illegal conspiracy because of the *wrongful means* used to implement the scheme, and that since these means are the chief elements of offense, the court will train its guns on them (though it might forbid even the other, innocent elements of the scheme, which are mingled with the wrongful elements). Thus in *International v. Red Jacket*, 18 Fed. (2d) 839 (1927), the judge found a full-fledged conspiracy, but ordered the coal union to cease only those actions which the court considered wrong in themselves.

(2) The alternative theory is that, if a union restrains interstate commerce (and judges will differ as to what actions do so), its whole scheme is unlawful, even though it is entirely peaceful and free of restraints by boycott.

The first formula best explains most of the decisions of the Supreme Court and also of the lower federal courts, though some of these have issued strong condemnations of unionism, sometimes explainable only under theory no. 2. Moreover, the language of the Supreme Court, very recently, in the *Apex Hosiery* decision of 1940 (below), seems to lean toward theory no. 2; the Court is saved from thereby abolishing unions only by the fact that it announces, though not too clearly, that it holds a very narrow view of what is

meant by "restraint of interstate commerce." The federal anti-injunction law also prevents federal courts from forbidding peaceful acts, even though they may violate the Sherman Act; and the Constitution might be invoked to prevent a ban on peaceful communication, even though it is otherwise a part of a conspiracy to restrain trade.

We shall accept theory no. 1 as our working hypothesis and quote from various court decisions which involve the Sherman Act in connection with the problem of violence, treated in this section, and the problem of boycotts, treated in Chapter 3 (in the *Danbury*, the *Bedford*, the *Pacific American*, and the *Hutcheson* cases). Whether or not theory no. 2 is also a useful way of explaining the decisions will perhaps be seen before the end of this section, and may again be considered in Chapter 3.

The unions of the United States first felt the threat of theory no. 2 fully when the Supreme Court's early decisions in boycott cases (the *Danbury Hatters* and *Bucks Stove* opinions of 1908 and 1911) seemed to union leaders to threaten a literal interpretation of the first words of the Sherman Act:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal.

Where union violence was to be found, as in the West Virginia coal-mining regions, its existence became an element in sweeping condemnations of the United Mine Workers' organizing drives, issued by lower federal courts under the anti-trust laws, as early as 1909³ and as late as 1927.⁴ The Supreme Court has never written such a sweeping condemnation of unionism, under the anti-trust laws, but it did open up considerable possibilities for federal suits for damages (triple damages) in its *Coronado* decisions in 1922 and 1925, the former of which is reported just below.

The *Coronado* decisions stated that if a unionizing campaign aimed to affect prices in the process of raising wages, it was restraining commerce, somewhat as capitalistic

² The union attorney argued that Congress did not, in the *Apex* case, the court opinion in which is printed below. A. T. Mason, *Organized Labor and the Law* (Durham, North Carolina: Duke University Press, 1925), concluded that Congress did.—C.R.

³ *Hitchman Coal and Coke Co. v. Mitchell*, 172 Fed. 963 (1909).—C.R.

⁴ *International v. Red Jacket*, 18 Fed. (2d) 839 (1927).—C.R.

combinations did. The coal miners' union wanted to unionize the whole industry; it did not want the Coronado or any other company to cut the price of coal, as it might do if it ran non-union, with low labor costs. The union feared that the whole industry might then be led to cut its prices, and that this action would lead to lower wage rates throughout the industry.

Would the Court condemn such restraints of commerce only where violence tainted it, as in the case of the Coronado strike? No; as we shall see in Chapter 3, the Court was also condemning restraint where the boycott method tainted it; in fact, boycotts affect trade opportunities so directly that the Court held commerce to be adversely affected without having to inquire whether the actions were tending to raise prices.

At about the same time as the *Coronado* decisions the Court canceled an injunction which had been granted under the anti-trust laws against the Leather Workers, who used intimidation in a strike which prevented the company from manufacturing for interstate commerce.⁵ There was no evidence of any attempt to affect prices, and the Court felt that to uphold the injunction would mean that any strike was subject to the Sherman Act. However, when in 1937 the Apex Hosiery Company brought a similar case to the federal courts, the circuit court granted an injunction, in disregard of the *Leather Workers* case. It held that the 1937 *Labor Board Cases*⁶ had stretched the meaning of interstate commerce and that the company need establish only that commerce had been interrupted substantially, by the union's violence.⁷

As we shall see, when the *Apex* case was brought, in 1940, in the form of a damage suit, to the Supreme Court, the Court rejected this circuit-court argument in favor of its own earlier rulings in the *Coronado* and

Leather Workers cases. In fact, it made a general declaration that the anti-trust laws as applied to either labor or capital were to be construed to condemn only the curtailing of commercial competition, only the raising of prices through combination.

The *Apex* situation seems much like the *Coronado* situation, except that the *Apex* company did not think it necessary to show that the union leaders thought of the strike as part of a plan to conquer all non-union territory. The Court avoided directly overruling its *Coronado* decision of 1925 by the *Apex* decision. For one thing it suggested that the amount of commerce involved in the *Apex* case was not substantial.⁸ The Court's language may also be construed to mean that only a combination of unions and companies to raise prices violates the Sherman Act. On the other hand, by failing to overrule past decisions such as that in the *Second Coronado Case* and the *Bedford* case (see Chapter 3), the Court leaves the way open for a future condemnation of conduct no more substantially related to interstate commerce and no more concerned with prices and no more of a conspiracy with unionized companies than were the union activities in the *Coronado* and *Bedford* situations.

Congress may in the future limit severely union activities which touch interstate commerce, even if the Court does not change its mind. As we shall see, the decision in the *First Coronado Case* spoke of Congress' broad power to restrain obstructions to commerce, and this power was clearly established by the Court when it upheld the National Labor Relations Act in 1937. However, according to a majority of the 1940 Court, in the *Apex* case, the 1937 *Labor Board* decisions did not automatically extend the scope of all past laws enacted by Congress under the commerce power—for instance, of the Sherman Act. If it was to be extended, Congress would have to do so explicitly.

⁵ *United Leather Workers v. Herkert and Meissel Trunk Co.*, 265 U. S. 457 (1924).—C.R.

⁶ See the *Jones & Laughlin* case in Chapter 5.—C.R.

⁷ *Apex Hosiery Co. v. Leader*, 90 F. (2d) 155 (1937).—C.R.

⁸ It was probably no more substantial in the *Coronado* case. The need to show substantial restraint was later stressed in *U. S. v. Gold*, 115 Fed. (2d) 236 (1940).—C.R.

THE FIRST CORONADO CASE
(*United Mine Workers of America v. Coronado Coal Company*)

Supreme Court of the United States. 1922.
259 U. S. 344; 42 Sup. Ct. 570; 66 L. Ed. 975.

MR. CHIEF JUSTICE TAFT . . . delivered the opinion of the court. . . .¹

First. It does not seem to us that there was a misjoinder of parties under the procedure as authorized in Arkansas. . . .

Second. Were the unincorporated associations, the International Union, District No. 21, and the local unions suable in their names? The United Mine Workers of America is a national organization. Indeed, because it embraces Canada it is called the International Union. Under its constitution, it is intended to be the union of all workmen employed in and around coal mines, coal washers and coke ovens on the American continent. Its declared purpose is to increase wages and improve conditions of employment of its members by legislation, conciliation, joint agreements and strikes. It demands not more than eight hours a day of labor. The union is composed of workmen eligible to membership and is divided into districts, sub-districts and local unions. The ultimate authority is a general convention to which delegates selected by the members in their local organizations are elected. The body governing the union in the interval between conventions is the International Board consisting of the principal officers . . . together with a member from each district. The president has much power. He can remove or suspend International officers, appoints the national organizers and subordinates, and is to interpret authoritatively the constitution, subject to reversal by the International Board. When the Board is not in

session, the individual members are to do what he directs them to do. He may dispense with initiation fees for admission of new locals and members. The machinery of the organization is directed largely toward propaganda, conciliation of labor disputes, the making of scale agreements with operators, the discipline of officers, members, districts and locals, and toward strikes and the maintenance of funds for that purpose. It is admirably framed for unit action under the direction of the National officers. It has a weekly journal, whose editor is appointed by the president, which publishes all official orders and circulars, and all the union news. Each local union is required to be a subscriber, and its official notices are to be brought by the secretary to the attention of the members. The initiation fees and dues collected from each member are divided between the national treasury, the district treasury and that of the local. Should a local dissolve, the money is to be transmitted to the National treasury.

The rules as to strikes are important here. Section 27 of Article IX of the constitution is as follows:

"The Board shall have power between conventions, by a two-thirds vote, to recommend the calling of a general strike, but under no circumstances shall it call such a strike until approved by a referendum vote of the members."

Under Article XVI, no district is permitted to engage in a strike involving all or a major portion of its members without sanction of the International Convention or Board.

Section 2 of that article provides that districts may order local strikes within their respective districts "on their own

¹ For a full consideration of the question of interstate competition and the union's relation to it, see the unabridged opinion and especially the Court's opinion in the *Second Coronado Case*, 268 U. S. 295 (1925). The excerpts printed here deal chiefly with the suability of the accused unions.—C.R.

responsibility, but where local strikes are to be financed by the International Union, they must be sanctioned by the International Executive Board."

Section 3 provides that in unorganized fields the Convention or Board must sanction strikes and no financial aid is to be given until after the strike has lasted four weeks, unless otherwise decided by the Board. The Board is to prescribe conditions in which strikes are to be financed by the International Union and the amount of strike relief to be furnished the striking members. In such cases, the president appoints a financial agent to assume responsibility for money to be expended from the International funds, and he only can make binding contracts. There is a uniform system of accounting as to the disbursements for strikes.

The membership of the union has reached 450,000. The dues received from them for the national and district organizations make a very large annual total, and the obligations assumed in travelling expenses, holding of conventions, and general overhead cost, but most of all in strikes, are so heavy that an extensive financial business is carried on, money is borrowed, notes are given to banks, and in every way the union acts as a business entity, distinct from its members. No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies.

Undoubtedly at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. . . . But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do

not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trademark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the States, and in many States authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards. . . . More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued . . . and this has had its influence upon the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported in which no question has been raised as to the right to treat them in their closely united action and functions as artificial persons capable of suing and being sued. It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike funds, would be to leave them remediless. . . .

Though such a conclusion as to the su-

ability of trades unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities as trade unions, it is after all in essence and principle merely a procedural matter. As a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury are liable to suit and recovery, and the only question is whether when they have voluntarily, and for the purpose of acquiring concentrated strength and the faculty of quick unit action and elasticity, created a self-acting body with great funds to accomplish their purpose, they may not be sued as this body, and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose. Trade unions have been recognized as lawful by the Clayton Act; they have been tendered formal incorporation as National Unions by the Act of Congress, approved June 29, 1886. . . . In the Act of Congress, approved August 23, 1912, c. 351, 37 Stat. 415, a commission on industrial relations was created providing that three of the commissioners should represent organized labor. The Transportation Act of 1920 . . . recognizes labor unions in creation of railroad boards of adjustment, and provides for action by the Railroad Labor Board upon their application. The Act of Congress, approved August 5, 1909 . . . and the Act approved October 3, 1913, . . . expressly exempt labor unions from excise taxes. Periodical publications issued by or under the auspices of trade unions are admitted into the mails as second-class mail matter. Act of 1912, c. 389, 37 Stat. 550. The legality of labor unions of postal employees is expressly recognized by Act of Congress, approved August 24, 1912. . . . By Act of Congress, passed August 1, 1914, no money was to be used from

funds therein appropriated to prosecute unions under the Anti-Trust Act. . . .

In this state of federal legislation, we think that such organizations are suable in the federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes. . . .

[Chief Justice Taft found further support for this opinion in the language of the Sherman Act which, in Section 7, included associations recognized by law, and in the fact that anti-trust prosecutions had been directed without challenge at unincorporated associations.]

For these reasons we conclude that the International Union, the District No. 21 and the twenty-seven Local Unions were properly made parties defendant here and properly served by process on their principal officers.²

Third. The next question is whether the International Union was shown by any substantial evidence to have initiated, participated in or ratified the interference with plaintiffs' business which began April 6, 1914, and continued at intervals until July 17, when the matter culminated in a battle and the destruction of the Bache-Denman properties. The strike was a local strike declared by the president and officers of the District Organization No. 21, embracing Arkansas, Oklahoma and Texas. . . .

Fourth. The next question is twofold: (a) Whether the District No. 21 and the individual defendants participated in a plot unlawfully to deprive the plaintiffs of their employees by intimidation and violence and in the course of it destroyed their properties, and, (b), whether they did these things in pursuance of a con-

² Many states, by statute or judicial decision permit suits against unions as entities, but this Supreme Court decision in 1922 did not lead the courts of the other states to give up the "common law" rule that the members would have to be sued. E. E. Witte, *The Government in Labor Disputes* (New York: McGraw-Hill, 1932), p. 144.—C.R.

spiracy to restrain and monopolize interstate commerce.

(a) . . . The evidence leaves no doubt that during the month of June there was a plan and movement among the union miners to make an attack upon Prairie Creek Mine No. 4. . . .

It is contended on behalf of District No. 21 and the local unions that only those members of these bodies whom the evidence shows to have participated in the torts can be held civilly liable for the damages. There was evidence to connect all these individual defendants with the acts which were done, and in view of our finding that District No. 21 and the unions are suable, we can not yield to the argument that it would be necessary to show the guilt of every member of District No. 21 and of each union in order to hold the union and its strike funds to answer. . . .

. . . the authority is put by all the members of the District No. 21 in their officers to order a strike, and if in the conduct of that strike unlawful injuries are inflicted, the District organization is responsible and the fund accumulated for strike purposes may be subjected to the payment of any judgment which is recovered.

(b) It was necessary, however, in order to hold District No. 21 liable in this suit under the Anti-Trust Act, to establish that this conspiracy to attack the Bache-Denman mines and stop the non-union employment there, was with intent to restrain interstate commerce and to monopolize the same, and to subject it to the control of the union. . . .

It is clear . . . that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint. Again, it has the power to punish conspiracies in which such practices are part of the plan, to hinder, restrain or monopolize interstate

commerce. But in the latter case, the intent to injure, obstruct or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances.

What really is shown by the evidence in the case at bar, drawn from discussions and resolutions of conventions and conferences, is the stimulation of union leaders to press their unionization of non-union mines not only as a direct means of bettering the conditions and wages of their workers, but also as a means of lessening interstate competition for union operators which in turn would lessen the pressure of those operators for reduction of the union scale or their resistance to an increase. The latter is a secondary or ancillary motive whose actuating force in a given case necessarily is dependent on the particular circumstances to which it is sought to make it applicable. If unlawful means had here been used by the National body to unionize mines whose product was important, actually or potentially, in affecting prices in interstate commerce, the evidence in question would clearly tend to show that that body was guilty of an actionable conspiracy under the Anti-Trust Act. This principle is involved in the decision of the case of *Hitchman Coal Co. v. Mitchell*, 245 U. S. 229, and is restated in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184. But it is not a permissible interpretation of the evidence in question that it tends to show that the motive indicated thereby actuates every lawless strike of a local and sporadic character, not initiated by the National body but by one of its subordinate divisions. . . .

Bache's breach of his contract with the District No. 21 in employing non-union men three months before it expired, his attempt to evade his obligation by a huggermugger of his numerous corporations, his advertised anticipation of trespass and

violence by warning notices, by enclosing his mining premises with a cable and stationing guards with guns to defend them, all these, in the heart of a territory that had been completely unionized for years, were calculated to arouse a bitterness of spirit entirely local among the union miners against a policy that brought in strangers and excluded themselves or their union colleagues from the houses they had occupied and the wages they had enjoyed. . . .

. . . There was no evidence submitted to the jury upon which they properly could find that the outrages, felonies and murders of District No. 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce. The motion to direct the jury to return a verdict for the defendants should have been granted.

Fifth. These conclusions make it unnecessary to examine the objection which the plaintiffs in error make to the supplemental charge of the court. . . .

The judgment is reversed. . . .

The company brought in further evidence that the union had looked on the strike as one step in a general movement to influence the coal industry in respect to wages and hence prices. The Supreme Court in 1925 accepted the evidence as showing that the district union had violated the anti-trust laws and that it owed the company \$200,000, tripled, plus ten years' interest and attorneys' fees. *Second Coronado Case (Coronado Coal Co. v. United Mine Workers)*, 268 U. S. 295 (1925). Since District 21 had no funds, the company settled the case for \$27,500, a small fraction of its total court costs.

In a similar suit against District 21 the Pennsylvania Mining Company of Arkansas at one time got an award of \$300,000, but it dropped the litigation in 1929.³ But after the "Herrin Massacre" of 1922 the Southern Illinois Coal Company threatened suit under the anti-trust law and District 12 bought the company up for triple its value, about \$700,000.⁴

³ Edward Berman, *Labor and the Sherman Act* (New York: Harper and Brothers, 1930), pp. 303-4.—C.R.

⁴ Witte, *op. cit.*, p. 140. An account of the "Herrin Massacre" and the trial and acquittal of the unionists is given in Oscar Ameringer, *If You Don't Weaken* (New York: Henry Holt and Company, 1940).—C.R.

UNITED STATES v. ANDERSON

United States Circuit Court of Appeals (7th Circuit). 1939.
101 Fed. (2d) 325.

SPARKS, Circuit Judge. On December 8, 1936, forty-one persons, including the thirty-four appellants, were indicted by a United States Grand Jury in the Southern Division of the Southern District of Illinois. There were two separate indictments against all the defendants. The first indictment, hereinafter referred to as the mail indictment, charged a conspiracy under section 37 of the Criminal Code, 18 U. S. C. A. section 88,¹ to violate sec-

tion 201 of the Criminal Code, 18 U. S. C. A. section 324.²

The second indictment hereinafter referred to as the antitrust indictment, charged the violation of section 1 of the Sherman Anti-Trust Act, 15 U. S. C. A. section 1.³ The first count of the indict-

² "Whoever shall knowingly and willfully obstruct or retard the passage of the mail, or any . . . carrier, or car . . . or other conveyance . . . carrying the same, shall be fined not more than \$100, or imprisoned not more than six months, or both."

³ "Every . . . conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall . . . engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine

¹ "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both."

ment charged that the Progressive Miners of America were organized on or about September 2, 1932, and immediately thereafter sought to prevent the operation of all coal mines within Illinois, by miners other than Progressives, and to require all owners of Illinois mines to employ Progressives; that in order to carry out that purpose, appellants, with others, engaged in a conspiracy in restraint of trade, that is to say, they conspired to obstruct, retard, prevent, and interfere with the transportation in interstate commerce of express, passenger and freight, including coal, over four specified railroad lines; their objects, among others, being to obstruct, retard and prevent the interstate transportation of coal mined and handled by non-Progressives, and to prevent such transportation, by intimidating such operators, miners and railroad employees by damaging and destroying railroad property, equipment and personal property, thus rendering such transportation more hazardous.

Count 2 of this indictment averred the same facts with respect to foreign commerce. Both counts alleged that in carrying out the conspiracy appellants bombed and burned railway bridges, lines, trucks, trains, freight and motor cars.

The court overruled appellants' amended motions to quash, and pleas of not guilty were interposed. It denied appellants' motion, filed nine days before trial, for leave to withdraw their pleas of not guilty in order to interpose a demurrer to the indictments. It denied appellants' motion for a bill of particulars under the mail indictment, and granted in part and denied in part a like motion addressed to the antitrust indictment. On the Government's motion the actions were consolidated for trial; appellant Gent's motion for a separate trial was

denied, and appellants' motion to require the Government to elect the count of the consolidated indictments upon which it would rely was overruled, and it was not again renewed. No exceptions were saved to any of these rulings except to the court's denial of leave to withdraw pleas of not guilty in order to interpose demurrers.

The jury returned a verdict of guilty as to all appellants on all counts, and the court entered judgment in accordance with the verdict, that is to say, on each of the two counts of the antitrust indictment, there was a sentence of imprisonment for a term of one year and a fine of \$5,000. On the mail indictment there was a sentence of imprisonment for a term of two years and a fine of \$10,000, and the sentences were to run consecutively.

[Many members of the United Mine Workers, which had a closed shop contract with the mine operators, seceded to the Progressive Miners, and when the operators proceeded to hire only U. M. W. members, the Progressives fought back, and much violence resulted.]

... the existence of a conspiracy as charged in both indictments is supported by substantial evidence, and we can not disturb the finding of the jury in this respect. Whether all the appellants were parties to the conspiracy within the meaning of the law is a matter we will discuss later in this opinion. We are convinced, however, that the Progressive Union was the perpetrator and abettor of the entire program.

It is contended by appellants that the three areas of operations, and the times and manners of the activities in each, conclusively show that the depredations in each were unrelated to the others, hence they urge that the participants in one area were not the same as those in the other areas and can not be held accountable therefor. . . . However, each contributed a material part in carrying out the general plan of stopping produc-

not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

tion in all the areas by doing his part in his home area, or where he was assigned for that purpose. The general plan was plainly described by defendant Keck, who was secretary and treasurer of the Progressive Union from 1932 to February 1935, and president of that Union from the latter date until February 1937. His official residence was at the headquarters in Gillespie, and in early February, when asked by a member of the Franklin County Strike Committee what the policy of the organization was for striking miners, he replied that he had one of two things to do—discontinue the strike or stop production of the mines, and that he had no intention of calling the strike off. This policy was certainly consistent with what had transpired in all the areas prior to that time, and was faithfully carried out afterwards in the Springfield and Franklin County areas. The record is replete with evidence of acquaintanceship and frequent contacts of the leaders of all the districts; the furnishing of dynamite by those in charge of the Progressive headquarters at Gillespie; the finding of unexploded dynamite of the same kind, and other materials such as fuses, wires and batteries at the scenes of bombings or attempted bombings; and the pertinent testimony of witnesses as to what they saw and heard leaves no doubt in our minds that the evidence was quite substantial to support the charge of a general conspiracy as described in the indictments.

[Defendants by conspiring to cause a general stoppage of railroad transportation are presumed to have intended interference with the mails.]

Appellants Newman, Lowe and Stewart contend that the court erred in not directing a verdict as to them because all of their proved activities admittedly occurred more than three years prior to the return of the indictments. It was charged and proved by substantial evidence that the conspiracy was a continu-

ing one, and the same evidence was relied upon to support both indictments. This contention is without merit under the ruling in *Hyde v. United States*, 225 U. S. 347, and *Boyle v. United States*, 259 Fed. 803. In the latter opinion it is said: "While the parties entering into such unlawful combination might have withdrawn from such combination and thereby have relieved themselves from further liability, and the statute of limitations would have begun to run from the time of such withdrawal, yet it required some affirmative act on the part of the conspirators to avoid the liability which their entry into the combination created." Here there was no affirmative act which in any manner indicated a withdrawal, and there was no error in denying a directed verdict for these three appellants. . . .

Appellants further insist that the court erred in not admitting evidence of other bombings, burnings, use of firearms, and the killing of a Progressive miner, by persons other than Progressives. These incidents offered in evidence were, in the court's opinion, unconnected with the depredations charged against appellants, and he remarked that if they were able to assure the court that the incidents were thus connected he would admit the testimony, to which appellants' counsel responded that he was unable to give that assurance. Under these circumstances they were properly excluded. It is now urged for the first time by appellants that such incidents tended to show provocation by others for retaliatory acts upon the part of appellants. This, if true, would not constitute a defense.

It is further contended by appellants that the court erred in admitting as evidence Government's Exhibit 221, an article which appeared in the *Progressive Miner* on June 23, 1933. . . . Appellants rely upon [the *First Coronado Case*, reported above, in which] the court held that communications from outsiders, and

editorials published in the United Mine Workers Journal giving accounts of past occurrences, and representing that the troubles were due to the aggression of the armed guards of the mine owners, and that the action of the union men was justified, did not constitute such a ratification by the Board or the president as to make the International Union liable for what had been done. We think the case is not in point. There the question of admissibility of evidence was not in

issue. Here there was positive substantial evidence that the Board authorized the publication. . . .⁴

⁴ The Court also decided that there was only one conspiracy to be punished, even though this conspiracy appeared in the indictment under both "mail" and "anti-trust"; that the lower court should have imposed only one punishment, and not imposed two cumulative penalties.—The Supreme Court refused to review the decision, 307 U. S. 625 (1939), perhaps because it thought the mail indictment applicable even if it did not think the anti-trust indictment proper. See its *Apex* decision, below.—C.R.

SIT-DOWNS, SLOW-DOWNS, AND PROPERTY

One of the sit-down strikes of 1937, the Apex Hosiery sit-down, made its way up through the courts. While it was doing so, in the fall of 1939, the United Automobile Workers undertook a "slow-down" in order to sign a better contract with the Chrysler Corporation. Though the slow-down was different in character from the sit-down, the new device was thought of as being related to the device of 1937; both were novel and suspect methods used by unions to increase their bargaining claims on employers' incomes. The following editorial opinion by David Lawrence appeared under the heading, "Slow-down in Factories Called Equivalent of Sit-down."¹

WASHINGTON, Oct. 21.—There's a war going on in the United States right now, but hardly anybody in Congress, with the exception of a few Michigan Congressmen, seems to be concerned about it.

The Federal statutes provide that no group of individuals may act concertedly to restrain the commerce of the nation. Even the right of a labor organization to strike does not include the right to impede or impair productive processes.

The appearance of the slow-down as the successor to the sit-down is a new development in labor-management warfare. The Wagner labor relations act was supposed to prevent labor strife by insisting on collective bargaining. But the Chrysler Corporation, victim of the new form of sabotage, has agreed to collective bargaining and the National Labor Relations Board has held an election which was won by the C. I. O.

Now, as a contract is being negotiated, coercion is applied in the form of a slow-down. Is the slow-down a lawful weapon? Does it differ from the sit-down, which now has been denounced by Federal and State court decisions so that it may be proceeded against through judicial channels?

The interstate commerce laws of the United States are specific. They forbid any two or more individuals acting in concert to interrupt or impede the flow of commerce. Plainly all the legal reasoning of the last three or four years on the part of the administration here has been along the line of a claim that strikes and labor wars affect the free flow of commerce. There is no doubt that a slow-down affects the free flow of commerce just as much as does a labor dispute. The right to quit work altogether has been upheld as lawful, but interference with

¹ This editorial appeared in the New York *Sun* on October 21, 1939. It is printed by permission of the author. It was reprinted by the Chrysler Corporation in its compilation, *What Editors Say about the Chrysler "Slow-Down" Strike*.—C.R.

or impairment of the property of an employer has not been held valid.

A slow-down is just as much an impairment of property as a destruction of needed tools. For, in automobile work, an assembly line cannot operate efficiently unless all concur in the schedules

set. For any group of men to attempt to influence others to withhold from an assembly line the work that must be performed is to restrain trade and commerce as plainly as if the shipments of the completed product were held up at the end of the assembly line. . . .

APEX HOSIERY COMPANY *v.* LEADER

Supreme Court of the United States. 1940.

310 U. S. 469; 60 Sup. Ct. 982; 84 L. Ed. 913.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner . . . brought the present suit . . . against respondent Federation, a labor organization, and its officers, to recover treble the amount of damage inflicted on it by respondents in conducting a strike at petitioner's factory alleged to be a conspiracy in violation of the Sherman Anti-Trust Act. . . . The trial to a jury resulted in a verdict for petitioner in the sum of \$237,310. . . . The trial judge trebled the verdict to \$711,932.55. . . . The Court of Appeals for the Third Circuit reversed, 108 F. (2d) 71, on the ground that the interstate commerce restrained or affected by respondents' acts was unsubstantial, the total shipment of merchandise from petitioner's factory being less than three per cent of the total value of the output in the entire industry of the country, and on the further ground that the evidence failed to show an intent on the part of respondents to restrain interstate commerce. We granted certiorari, 309 U. S. 644, the questions presented being of importance in the administration of the Sherman Act.

The facts are undisputed. There was evidence from which the jury could have found as follows. Petitioner employs at its Philadelphia factory about twenty-five hundred persons in the manufacture of hosiery, and manufactures annually merchandise of the value of about \$5,000,000. Its principal raw materials are

silk and cotton, which are shipped to it from points outside the state. It ships interstate more than 80 per cent of its finished product, and in the last eight months of 1937 it shipped in all 274,791 dozen pairs of stockings. In April, 1937, petitioner was operating a non-union shop. A demand of the respondent Federation at that time for a closed shop agreement came to nothing. On May 4, 1937, when only eight of petitioner's employees were members of the Federation, it ordered a strike. Shortly after midday on May 6, 1937, when petitioner's factory was shut down, members of the union, employed by other factories in Philadelphia, who had stopped work, gathered at petitioner's plant. Respondent Leader, president of the Federation, then made a further demand for a closed shop agreement. When this was refused Leader declared a "sit-down strike." Immediately, acts of violence against petitioner's plant and the employees in charge of it were committed by the assembled mob. It forcibly seized the plant, whereupon, under union leadership, its members were organized to maintain themselves as sit-down strikers in possession of the plant, and it remained in possession until June 23, 1937, when the strikers were forcibly ejected pursuant to an injunction ordered by the Court of Appeals for the Third Circuit in *Apex Hosiery Co. v. Leader*, 90 F. (2d) 155, 159; reversed and dismissal ordered as moot

in *Leader v. Apex Hosiery Co.*, 302 U. S. 656.¹

The locks on all gates and entrances of petitioner's plant were changed; only strikers were given keys. No others were allowed to leave or enter the plant without permission of the strikers. During the period of their occupancy, the union supplied them with food, blankets, cots, medical care, and paid them strike benefits. While occupying the factory, the strikers wilfully wrecked machinery of great value, and did extensive damage to other property and equipment of the company. All manufacturing operations by petitioner ceased on May 6th. As the result of the destruction of the company's machinery and plant, it did not resume even partial manufacturing operations until August 19, 1937. The record discloses a lawless invasion of petitioner's plant and destruction of its property by force and violence of the most brutal and wanton character, under leadership and direction of respondents, and without interference by the local authorities.

For more than three months, by reason of respondents' acts, manufacture was suspended at petitioner's plant and the flow of petitioner's product into interstate commerce was stopped. When the plant was seized there were on hand 130,000 dozen pairs of finished hosiery, of a value of about \$300,000, ready for shipment on unfilled orders, 80 per cent of which were to be shipped to points outside the state. Shipment was prevented by the occupation of the factory

by the strikers. Three times in the course of the strike respondents refused requests made by petitioner to be allowed to remove the merchandise for the purpose of shipment in filling the orders. . . .

. . . In this suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws. Their only jurisdiction is to vindicate such federal right as Congress has conferred on petitioner by the Sherman Act and violence, as will appear hereafter, however reprehensible, does not give the federal courts jurisdiction.

At the outset, and before considering the more substantial issues which we regard as decisive of this cause, it is desirable to remove from the field of controversy certain questions which have been much argued here and below, but which we think, in the circumstances of the present case, are irrelevant to decision. We find abundant support for petitioner's contention that the effect of the sit-down strike was to restrict substantially the interstate transportation of its manufactured product, so as to bring the acts of respondents by which the restriction was effected within the reach of the commerce power if Congress has seen fit to exercise it. . . . recently, where the statute was by its terms applicable and the question was of Congressional power, we have sustained the application of the Wagner Act . . . regulating labor relations "affecting" interstate commerce to situations no more closely related to the commerce than these, and where the interstate commerce affected was no greater in volume. And in the application of the Sherman Act, as we have recently had occasion to point out, it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation. . . .

. . . It is not seriously contended here that a conspiracy to derail and rob an in-

¹ The District Court refused the injunction, but the Circuit Court took the position that the *Labor Board Cases* had widened the definition of interstate commerce. The Supreme Court avoided the issue by finding the question "moot"—the union had long since evacuated the plant. The company then began its damage suit. The district judge bowed to the injunction decision of the Circuit Court and held that the anti-trust laws permitted a damage suit. This case then went to the Circuit Court, which had meanwhile been entirely reconstituted, and it now held opposite to what it had said before; in that decision it is here sustained by the Supreme Court.—*C.R.*

terstate train, even though it were laden with 100,000 dozen pairs of stockings, necessarily would involve a violation of the Sherman Act. This Court has never applied the Act to laborers or to others as a means of policing interstate transportation, and so the question to which we must address ourselves is whether a conspiracy of strikers in a labor dispute to stop the operation of the employer's factory in order to enforce their demands against the employer is the kind of restraint of trade or commerce at which the Act is aimed, even though a natural and probable consequence of their acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer.

A point strongly urged in behalf of respondents in brief and argument before us is that Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. To this the short answer must be made that for the thirty-two years which have elapsed since the decision of *Loewe v. Lawlor*, 208 U. S. 274, this Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act, "Every contract, combination . . . or conspiracy in restraint of trade or commerce" do embrace to some extent and in some circumstances labor unions and their activities . . . ; and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operation of the Act. . . . On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it. . . .

The critical words which circumscribe the judicial performance of this function so far as the present case is concerned are "Every . . . combination . . . or con-

spiracy in restraint of trade or commerce." Since in the present case, as we have seen, the natural and predictable consequence of the strike was the restraint of interstate transportation the precise question which we are called upon to decide is whether that restraint resulting from the strike maintained to enforce union demands by compelling a shutdown of petitioner's factory is the kind of "restraint of trade or commerce" which the Act condemns.

In considering whether union activities like the present may fairly be deemed to be embraced within this phrase, three circumstances relating to the history and application of the Act which are of striking significance must first be taken into account. The legislative history of the Sherman Act as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate transportation of movement of goods and property. The legislative history and the voluminous literature which was generated in the course of the enactment and during fifty years of litigation of the Sherman Act give no hint that such was its purpose. They do not suggest that, in general, state laws or law enforcement machinery were inadequate to prevent local obstructions or interferences with interstate transportation, or presented any problem requiring the interposition of federal authority. In 1890 when the Sherman Act was adopted there were only a few federal statutes imposing penalties for obstructing or misusing interstate transportation. With an expanding commerce, many others have since been enacted safeguarding transportation in interstate commerce as the need was seen, including statutes declaring conspiracies to interfere [with interstate commerce by violence] to be felonies. It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of "trusts" and of "combinations" of businesses and of cap-

ital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

For that reason the phrase "restraint of trade" which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited. . . .

A second significant circumstance is that this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services and finally this Court has refused to apply the Sherman Act in cases like the present in which local strikes conducted by illegal means in a production industry prevented interstate shipment of substantial amounts of the product but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way. *First Coronado* [Case, reported above]; *Leather Workers* case [265 U. S. 457]. *Levering & G. Co. v. Morrin*, 289 U. S. 103. . . .

The question remains whether the effect of the combination or conspiracy among respondents was a restraint of trade within the meaning of the Sherman Act. This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. See *United*

States v. Brims, 272 U. S. 549 [reported in Chapter 3]; *Local 167 v. United States*, 291 U. S. 293. Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market. . . .

A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." Since the enactment of the declaration in §6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations or the members thereof be held or construed to be illegal combinations or conspiracies in the restraint of trade under the Anti-Trust laws," it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on com-

petition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. *Appalachian Coals, Inc. v. United States*, [288 U. S. 344], 360. Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See *Levering & G. Co. v. Morrin*, *supra*; cf. *American Foundries case*, [257 U. S. 184], 209; *Window Glass Manufacturers v. United States*, 263 U. S. 403.² And in any case, the restraint here is, as we have seen, of a different kind and has not been shown to have any actual or intended effect on price or price competition.

² Federal legislation aimed at protecting and favoring labor organizations and eliminating the competition of employers and employees based on labor conditions regarded as substandard, through the establishment of industry wide standards both by collective bargaining and by legislation setting up minimum wage and hour standards, supports the conclusion that Congress does not regard the effects upon competition from such combinations and standards as against public policy or condemned by the Sherman Act.

The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§101-115, limiting the use of injunctions in labor disputes, is predicated on the policy that "under prevailing economic conditions," it is necessary that the worker "have full freedom of association . . . to negotiate the terms and conditions of his employment." The Railway Labor Act of 1934, 48 Stat. 1185, 45 U. S. C. §§151-164, provided for independence of railroad employees in the matter of self-organization. The National Labor Relations Act, 49 Stat. 449, 29 U. S. C. §§151-166, was passed to

This Court first applied the Sherman Act to a labor organization in *Loewe v. Lawlor*, 208 U. S. 274, in 1908. . . . The restraint alleged was not a strike or refusal to work in the complainants' plant, but a secondary boycott by which, through threats to the manufacturer's wholesale customers and their customers, the Union sought to compel or induce them not to deal in the product of the complainants, and to purchase the competing products of other unionized manufacturers. . . . Like problems found a like solution in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, and in *Bedford Cut Stone Company v. Journeymen Stone Cutters* [see Chapter 3]; where in the one case, a secondary boycott, and in the other, the refusal of the union to work on a product in the hands of the purchaser, were carried on on a country-wide scale by a national labor organization, in order to induce the purchasers of a manufactured product shipped in interstate commerce to withdraw their patronage from the producer. In both, as in the *Loewe* case, the effort of the union was to compel unionization of an employer's factory, not by a strike in his factory but by restraining by the boycott or refusal to work on the manufactured product purchases of his product in in-

protect the workers in the "exercise of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment . . ." and expressly protects the right of self-organization, recognizes the strike as a proper union weapon and permits closed-shop contracts.

The Public Contracts Act, 49 Stat. 2036, 41 U. S. C. §§35-48, was aimed at preventing price competition in government bidding based on wage cutting and authorizes the establishment of minimum wage standards. The Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. §§201-219, likewise seeks to eliminate competition which thrived upon low wages and substandard working conditions.

This series of acts clearly recognizes that combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to the public policy. [As to the first three acts, see Chapters 1, 4, 5; as to the other two, see 6, 7, and 8.]

terstate commerce in competition with the like product of union shops.

In the *Bedford Stone* case it was pointed out that, as in the *Duplex Printing Press Co.* case, the strike was directed against the use of the manufactured product by consumers "with the immediate purpose and effect of restraining future sales and shipments in interstate commerce" and "with the plain design of suppressing or narrowing the interstate market," and that in this respect the case differed from those in which a factory strike, directed at the prevention of production with consequent cessation of interstate shipments, had been held not to be a violation of the Sherman law. See *First Coronado [Case]*, *supra*; *Leather Workers case*, [265 U. S. 457 (1924)]. . . .

Both the *Duplex Printing Co.* and *Bedford Stone* cases followed the enactment of the Clayton Act and the recognition of the "rule of reason" in the *Standard Oil* case [221 U. S. 1]. The applicability of that rule to restraints [of trade] affected by a labor union in order to promote and consolidate the interests of its union was not considered.³ But an important point considered and decided by the Court in both cases was that nothing in the Clayton Act precluded the relief granted. We are not now concerned with the merits of either point. The only significance of the two cases for present purposes is that in each the Court considered it necessary, in order to support its decision, to find that the re-

straint operated to suppress competition in the market.

This Court was first called on to consider a case like the present in the *First Coronado [Case]*, *supra*. There a local branch of a national labor union sought to unionize a coal mine which was shipping its product interstate to the extent of more than 5,000 tons a week. Members of the union compelled the mine to shut down, by force and violence, including murder and arson. By reason of their forcible action all work at the mine was prevented, it filled with water, shipments of coal which were regularly moving in interstate commerce as mined, ceased, and the strikers burned more than ten cars, three of them loaded with coal and some billed for movement interstate. This Court, notwithstanding the admittedly substantial effect of the strike on the interstate movement of the coal, and the admittedly illegal and outrageous acts of the strikers, held that it was not a restraint of trade or commerce prohibited by the Sherman Act. It rested its decision specifically on two grounds: that "obstruction to coal mining is not a direct obstruction to interstate commerce in coal,"⁴ and that the intent to obstruct the mining of coal and to burn the loaded cars, did not necessarily imply an intent to restrain the commerce, although concededly interstate shipments and the filling of interstate orders for coal were necessarily ended by the stoppage of mining operations and the destruction of the loaded cars. It perhaps suffices for present purposes to say that if the strike in the *Coronado* case was

³ Whether the interest of the labor unions in these cases in maintaining and extending their respective organizations, rendered the restraint reasonable as a means of attaining that end within the common law rule, or brought the restraints within the rule of reason developed and announced in the *Standard Oil* case, was not discussed and we need not consider it here. Restraints upon the competitive marketing of a manufacturer's product brought about by an agreement between the employer and his employees in order to secure continuous employment of the employees was held to be within the rule of reason and therefore not an unreasonable restraint of trade in *National Association of Window Glass Mfrs. v. United States*, 263 U. S. 403

⁴ The assertion that the decision in the *First Coronado [Case]* rests on the ground that "production, as such—in that case, coal mining—was not interstate commerce" is neither supported by the opinion in that case nor by its subsequent interpretation by [us]. The opinion recognized that the cessation of production of the coal prevented interstate commerce in the coal but held that it did not violate the Sherman Act because the effect on the commerce was "indirect," to which it was thought the Sherman Act did not apply.

not within the Sherman Act because its effect upon the commerce was "indirect" and because the "intention" to shut down the mine and destroy the cars of coal destined for an interstate shipment, did not imply an "intention to obstruct interstate commerce," then the like tests require the like decision here.

But we are not relegated to so mechanical an application of these cryptic phrases in the application of the Sherman Anti-Trust Act, for the Court has since so interpreted them as to give to the phrase "restraint of trade or commerce" a meaning and content consonant with the legislative and judicial history of the Act to which we have referred. In the *Leather Workers* case, *supra*, the Court was again called on to determine whether a local strike in a factory which prevented shipment of its product in filling interstate orders of substantial volume violated the Sherman Act. As in the *First Coronado* [Case] the Court held that the restraint was not one prohibited by the Sherman Act. It pointed out, [in the *Leather Workers* case, at] page 469, that there has been no attempt, as in *Loewe v. Lawlor*, to boycott the sale of complainant's products in other states, and that if the interruption of interstate shipments resulting from a local factory strike aimed at compelling the employer to yield to union demands were deemed within the sweep of the Sherman Act, "The natural, logical and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to Federal jurisdiction providing any appreciable amount of its product enters into interstate commerce," page 471. . . .

. . . in the *Second Coronado* [Case], *supra*, 310, . . . it appeared that "the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other states than Arkansas, where it

would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines. . . ." The Court declared such a restraint to be a "direct violation of the Sherman Act." The like distinction was taken and explanation made in the *Bedford Stone* case, [274 U. S. 37,] pp. 46, 49, where the restraint consisted in the refusal of the unions to work on stone shipped interstate from an open shop quarry after its interstate journey to the purchaser had ended, and where it appeared that the purpose of the strike was to prevent the interstate sale of the stone in competition with the product of unionized producers. Cf. *Levering & G. Co. v. Morrin*, *supra*.

These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which were actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to "monopolize the supply, control its price, or discriminate between its would-be purchasers." These elements of restraint of trade, found to be present in the *Second Coronado* [Case] and alone to distinguish it from the *First Coronado* [Case] and the *Leather Workers* case, are wholly lacking here. We do not hold that conspiracies to obstruct or prevent transportation in interstate commerce can in no circumstances be violations of the Sherman Act. Apart from the Clayton Act it makes no distinction between labor and non-labor cases. We only hold now, as we have previously held both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in

fact have, the effects on the market on which the Court relied to establish violation in the *Second Coronado [Case]*. Unless the principle of these cases is now to be discarded, an impartial application of the Sherman Act to the activities of industry and labor alike would seem to require that the Act be held inapplicable to the activities of respondents which had an even less substantial effect on the competitive conditions in the industry than the combination of producers upheld in the *Appalachian Coal* case and in others on which it relied.⁵

If, without such effects on the market, we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decisions precludes it. The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress. The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by vio-

lence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence.

Affirmed.

MR. CHIEF JUSTICE HUGHES (dissenting): . . .

Section one of the Sherman Act condemns as illegal every "combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." "Conspiracy" is a familiar term of art and means a combination of two or more persons by concerted action to accomplish an unlawful purpose, or some purpose not in itself unlawful by unlawful means. There was plainly a conspiracy here. To "restrain" is to hold back, repress, obstruct,—to hinder from liberty of action. Manifestly there was restraint in this case. What then is the significance of the term "commerce" as used in the Act? Adopting the language of the Constitution, Congress evidently used the term in its constitutional sense. "Commerce" is intercourse; in its most limited meaning it embraces traffic. *Gibbons v. Ogden*, 9 Wheat. 1, 189. "Commerce" manifestly covers the shipment and transportation of commodities across state lines to execute contracts of sale. The term "commerce," we said in *Second Employers' Liability Cases*, 223 U. S. 1, 46, "embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers whether carried on by water or by land."

As the instant case falls directly within the language of the Sherman Act in its natural import, the question is whether that language has been, or should be, so narrowed by judicial construction as to exclude from its application the conspiracy and restraint here found. . . .

⁵ It is said to be anomalous to hold employers subject to the Labor Act because their unfair practices would prevent the shipment of their goods in interstate commerce, and at the same time to hold that the activities of employees which amount to a "direct and intentional obstruction" to interstate movement of goods, not to be within the meaning of "restraint of trade or commerce," under the Sherman Act. If any other answer than a comparison of the legislative history and objectives of the two acts, and our decisions under them, were needed, it seems obvious that the Sherman Act cannot be said to subject employees to a liability which it does not impose on employers or others.

Why then should the Sherman Act be construed to be inapplicable? It is said that the Act was not aimed at "policing" interstate transportation. But this would seem to be a statement of result rather than a justification for reaching it. If "policing" means the protection of interstate transportation from unlawful conspiracies to restrain it, it would seem that the Sherman Act provides that protection. The fact that various statutes have been passed by Congress to prevent the transportation of articles deemed to be injurious does not indicate the contrary, for these are statutes restricting the right of transportation in order to protect the public, while the Sherman Act is aimed at securing the freedom of transportation in lawful commerce.

The question whether a conspiracy to prevent transportation in interstate commerce was within the Sherman Act came before the circuit courts not long after the Act was passed. In *United States v. Workmen's Amalgamated Council*, 54 Fed. 994, it appeared that in consequence of a difference between the warehousemen in New Orleans and their employees and the principal draymen and their subordinates, a strike was called by labor associations which enforced "a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the City of New Orleans, from state to state, and to and from foreign countries." By the intended effect of the defendants' actions, "not a bale of goods constituting the commerce of the country could be moved." District Judge Billings, sitting in the Circuit Court, concluded that there was no question "but that the combination of the defendants was in restraint of commerce" and hence a violation of the Sherman Act. . . .

In the light of these decisions of the circuit courts and of the significant and unanimous expressions by this Court,

the argument seems to be untenable that the Sherman Act has been regarded as not extending to conspiracies to obstruct or prevent transportation in interstate or foreign commerce. On the contrary, I think that hitherto it has not been supposed that such conspiracies lay outside the Act.

With this background we come to the question whether the application of the Sherman Act in the instant case, which would otherwise appear to be required by its comprehensive terms, has been precluded by our decisions in labor cases. The view is announced that the Sherman Act was not directed at those restraints which fall short of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers. That is, in short, that it does not apply to the direct and intentional obstruction or prevention of the shipment or transportation of goods to fill the orders of customers in interstate commerce such as we have here. I do not read our decisions as either requiring or justifying such a judicial limitation of the provisions of the Act. Rather, I believe, they point to a contrary conclusion.

. . . of what avail is it to interdict boycotts or to assure a free market, that is, to secure freedom in obtaining customers, and yet to leave unprotected the right to ship goods to the customers who are thus obtained? Of what advantage is it to solicit orders freely in interstate commerce if they cannot be filled? The freedom of interstate movement—immunity from conspiracies directly to restrain shipment and delivery—lies at the very base of a free market and the untrammelled making of sales.

The *First Coronado Company* [Case] (259 U. S. 344), chiefly relied upon, does not seem to afford an adequate basis for the broader ruling now made. That decision was centered upon the point that

production, as such,—in that case, coal mining,—was not interstate commerce, and that obstruction to coal mining through a strike was not in itself a direct obstruction to interstate commerce. *Id.*, pp. 407, 408. And it was deemed to be necessary to go further and find an “intent to injure, obstruct or restrain interstate commerce” in order to bring the case within the Sherman Act. The evidence was found insufficient to show such an intent. Thus, the Court did not decide that a direct and intentional obstruction of interstate commerce was not a violation of the Act. In the *Second Coronado Company [Case]* (268 U. S. 295), evidence of that intent was supplied and the Court accordingly set aside a judgment in favor of the local union. It is true that the Court, in dealing with the purpose of the local union, found that it was to stop the production of non-union coal and prevent its shipment to markets of other States, where by competition it would tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines. But the interstate commerce that was thus found to be directly and intentionally obstructed was the shipment of the coal, and whether the purpose was to maintain unionization in other States, or within the same State, would not seem to be material, so long as the interstate commerce in either case is directly and intentionally prevented.

The Court in the *Second Coronado Company [Case]* not only decided the particular case but laid down the general principle as follows: “But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.” *Id.*, p. 310.

The use of the disjunctive [supply or price] is significant. . . .

In *Levering & Garrigues Company v. Morrin*, 289 U. S. 103, 107, there was no showing of a direct or intentional restraint of interstate commerce. But in *Local 167 v. United States*, 291 U. S. 293, the evidence showed a conspiracy “to burden the free movement of live poultry into the metropolitan area” in New York. The Court said: “The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce.” *Id.*, p. 297. Thus it was “the untrammelled shipment and movement” which, when found to be directly and intentionally restrained, was held to constitute violation of the Sherman Act.

Suppose, for example, there should be a conspiracy among the teamsters and truck drivers in New York City to prevent the hauling of goods and their transportation in interstate commerce, can it be doubted that the Sherman Act would apply? Would it not be essentially the same sort of obstruction of interstate commerce as was found to have been effected in *United States v. Workingmen's Amalgamated Council*, *supra*, where the transportation of goods in New Orleans in interstate commerce was tied up? There the defendants paralyzed local business and their object was to benefit themselves in their dealings with their employers, but to attain that end they directly and intentionally obstructed the movement of goods in interstate commerce and thus came within the interdiction of the Act. The fact that the defendants in the instant case are not teamsters can make no difference as it is the direct and intentional prevention

of interstate commerce that turns the scales.

Our decisions have said much of the "free flow" of interstate commerce. What is this metaphor of an interstate stream protected in its flow by the Sherman Act but a striking way of describing the movement of goods by untrammelled shipments in pursuance of freely negotiated sales?

It was to protect this free movement from being obstructed by industrial strife through the denial of collective bargaining that Congress passed the National Labor Relations Act. In sustaining the validity of that Act we referred to our decisions with respect to the conduct of employees engaged in production, summing up the matter in this way: "And in the second *Coronado* case the Court ruled that while the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the 'intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Sherman Anti-Trust Act.'" *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 40. It is true that in that case we were considering the power of Congress over interstate commerce, but we were pointing to the exercise of that power in the Sherman Act, with respect to which we had previously said "that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 435. That power, and its exercise, should

not be deemed to fall short of the protection of the interstate shipment of goods from conspiracies to impose a direct restraint upon it.

The attempt in the court below to distinguish between the use of the word "affect" in the National Labor Relations Act and the word "restraint" in the Sherman Act is ineffectual as it fails to take note of the fact that the word "affect" was construed as purporting "to reach only what may be deemed to burden or obstruct" interstate or foreign commerce, and hence under the familiar principle "that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power," the statute was upheld. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, *supra*, pp. 31, 32 [reported in Chapter 5]. . . .

It would indeed be anomalous if, while employers are bound by the Labor Act because their unfair labor practices may lead to conduct which would prevent the shipment of their goods in interstate commerce, at the same time the direct and intentional obstruction or prevention of such shipments by the employees were not deemed to be a restraint of interstate commerce under the broad terms of the Sherman Act.

This Court has never heretofore decided that a direct and intentional obstruction or prevention of the shipment of goods in interstate commerce was not a violation of the Sherman Act. In my opinion it should not so decide now. It finds no warrant for such a decision in the terms of the statute. I am unable to find any compulsion of judicial decision requiring the Court so to limit those terms. Restraints may be of various sorts. Some may be imposed by employers, others by employees. But when they are found to be unreasonable and directly imposed upon interstate commerce, both employ-

ers and employees are subject to the sanctions of the Act.

It is said that such a view would bring practically every strike in modern industry within the application of the statute. I do not agree. The right to quit work, the right peaceably to persuade others to quit work, the right to proceed by lawful measures within the contemplation of the Clayton Act to attain the legitimate objects of labor organization, is to my mind quite a different matter from a conspiracy directly and intentionally to prevent the shipment of goods in interstate commerce either by their illegal seizure for that purpose, or by the direct and intentional obstruction of their transportation or by blocking the highways of interstate intercourse.

Once it is decided, as this Court does decide, that the Sherman Act does not except labor unions from its purview,—once it is decided, as this Court does decide, that the conduct here shown is not within the immunity conferred by the Clayton Act,—the Court, as it seems to me, has no option but to apply the Sherman Act in accordance with its express provisions.

MR. JUSTICE McREYNOLDS and MR. JUSTICE ROBERTS join in this opinion.

The Apex company then pushed suits which it had been carrying on at the same time in the Pennsylvania state courts, both against the union and against the county and the public officials who it said failed to furnish it police protection.

The *Apex* decision came at the time of an anti-trust drive which seemed aimed largely at bringing down costs of construction. In connection with this drive the Anti-Trust Division had announced that “unreasonable” union purposes which affected commerce would be prosecuted—for instance, union rules which hindered the lowering of labor costs by hampering the introduction of technological improvements. The *Apex* decision apparently restricted the Division to prosecuting companies and prosecuting unions which aided companies in excluding competitors or in fixing minimum prices. This restriction was made more definite by the refusal of the Supreme Court, on February 3, 1941, to uphold an indictment against the Carpenters’ union, which was boycotting Anheuser-Busch in connection with the Carpenters’ jurisdictional dispute with the Machinists’ union. See *U. S. v. Hutcheson*, in Chapter 3.

V. INJUNCTIONS AGAINST INTIMIDATION

Though picketing, especially where done by more than two pickets, has been limited mostly by police activity, based on general criminal laws, yet in many cases the device used against it has been the injunction. An injunction is an order issued by a judge forbidding certain persons to do what they are about to do—a special law governing the particular situation, sometimes specifically worded, sometimes vaguely and sweepingly. Injunctions in labor disputes are rarely found outside the United States.

The next chapters show that injunctions have been used a good deal to forbid even mild and peaceful picketing in situations in which the company could claim that the purpose of the union was an unreasonable one or that in some other way the entire project was

basically unlawful. The present section deals only with cases involving violence or acts bordering on violence.

The legal pattern into which the injunction fits is this: A company which is harmed by the action of a union may claim damages unless the union’s action is thought by the judges to be justifiable or reasonable. For instance, if pickets assault “scabs,” the latter may ask to have the criminal law applied, and so may the company. The “scabs” might also sue the union for damages, and so might the company, since its business is affected. In practice, suits for damages are rare; but if a company wants to get an injunction, it must show, at least in a general sort of way, that it has a legal right to damages because of what the union has been doing and is

about to do. But then the company must go on to show that a damage suit is not an adequate legal remedy; that, if special steps are not taken to prevent the union's action, the union will do the company irreparable injury.

Injunction cases are called "equity" cases. This means that the order of injunction is made by a judge and, if the order is violated and the violator is arrested for "contempt of court," his trial is traditionally before the same judge and is traditionally without a jury. These traditions make the chances of conviction greater, and unions have stressed the inequity of a trial (for what is often really a criminal offense) without the jury to which we are accustomed in criminal cases. While this practice gave the unions a very strong propaganda point against injunctions, arrests for contempt were actually very few. Either the unionists were frightened into obedience by the injunction, or, if they were not, and were arrested, the arrests were usually on minor criminal charges which often did not involve jury trial either. An illustration of police enforcement of an injunction—that of the Chicago Hardware Foundry—was given in an earlier section.

The decision of the Supreme Court in the *Debs* case in 1895 (below) put the American labor injunction on a firm legal footing. Governments rarely sought injunctions (as the federal government had in that case), but employers regularly did. Labor unions immediately began to lobby for a change, at least in the federal law. But it was not till 1914 that it got results—Congress added to the Clayton Act of 1914 some clauses relating to the treatment of unions by federal courts, partly in relation to anti-trust law suits and partly in relation to injunction cases which were brought in the federal courts because of diversity of citizenship. From time to time, also, various state legislatures passed similar anti-injunction laws. Two sections of the Clayton Act are printed below.

The importance of the Clayton Act clauses was that they seemed to legitimize secondary

boycotts; we shall see in Chapter 3 that they were held not to. It is true that in the Clayton Act labor unions gained a beginning of the movement toward jury trials in contempt cases; on the other hand, the Clayton Act gave employers the power to sue for injunctions under the anti-trust act (between 1890 and 1914 they had had power only to sue for damages and to request the federal authorities to begin an injunction suit or a criminal prosecution).

The state anti-injunction acts might have reduced the legal duties and liability of unions, especially since most suits against unions were brought in the state courts. However, these acts too were given a very limited interpretation by the state courts; where they were not, they faced a constitutional hurdle, as we shall see in the *Truax* case.

About ten years after the Supreme Court made clear the limitations which it would impose on this sort of anti-injunction law, Congress, in 1932, passed the Norris-LaGuardia Act, which is printed below. Perhaps its main effect was on the legality of secondary boycotts and similarly suspect projects, as we shall see in Chapter 3. But it also put obstacles in the way of the employer who wanted to use the injunction method against a union whose methods bordered on violence. A good many states passed similar revamped anti-injunction acts. The courts accepted the new laws somewhat more generally than they had accepted the earlier ones.

The use of the labor injunction and the case for the new laws were well elaborated by Frankfurter and Greene in 1929.¹ A short statement of the same topics, and a résumé of the effect of the new laws is given in *Labor Problems in America*.²

¹ Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: The Macmillan Company, 1929).

² Carl Raushenbush, "Anti-injunction Laws," Chapter 29 in Stein and others, *Labor Problems in America*.

In re DEBS, PETITIONER

Supreme Court of the United States. 1895.
158 U. S. 564; 15 Sup. Ct. 900; 39 L. Ed. 1092.

In 1894 the car manufacturing workers of the Pullman Palace Car Company at the company town of Pullman, Illinois, struck against a wage cut and the discharge of men who had acted on a bargaining committee. Some of these workers belonged to the new American Railway Union which Eugene V. Debs had organized on an industrial basis in competition with the craft railroad unions. The A. R. U. agreed that its members should refuse to handle Pullman cars, and the result was a widespread strike centering on Chicago. At first the strike was fairly successful; many craft members walked out in sympathy. Chicago saw rioting, much of it by hoodlums who had stayed in Chicago after the 1893 Exposition. Federal soldiers (sent by President Cleveland over the head of Illinois' Governor Altgeld) and an injunction secured by federal Attorney General Olney broke the strike. Debs and other leaders were jailed for contempt; as we see here, their *habeas corpus* appeal to the Supreme Court was unsuccessful. Their offense—obstructing the mails and hindering commerce—was also brought to criminal trial, but the case was called off in its early stages. During the strike, also, many railroad companies secured injunctions modeled on the government injunction.

President Cleveland appointed a commission of inquiry under the otherwise neglected railway labor act of 1888. Its hearings (quoted from by the Court, just below) are given in U. S. Strike Commission, *Report on the Chicago Strike* (1895). Besides making other suggestions, the commission recommended that railroads be penalized if they discriminated against union members and that mediation and arbitration be encouraged. Congress embodied these of the commission's suggestions in the Erdman Act of 1898. Something of the subsequent history of these devices will be found in later chapters.

Justice Brewer, speaking for the Court in the *habeas corpus* phase of the *Debs* case, held that the "relations of the general government to interstate commerce and the

transportation of the mails" were "such as to authorize a direct interference to prevent a forcible obstruction thereof," and that the government was not confined to criminal penalties and the sending of troops but could use the courts of equity too. "The United States have a property in the mails" which gives it standing in such courts, but equity courts, also, should stand ready to help government protect the general welfare. They may enjoin the threatened commission of crimes if property rights are shown to be involved.

The petitioner's brief urged that the remedy for mob action was essentially executive and military. But the Court replied, not only that the government had the power to use the injunction if it chose, but that it had turned out to be an efficacious weapon, since there was not an actual rebellion in process.

* * * *

MR. JUSTICE BREWER. . . .

. . . We find in the opinion of the circuit court a quotation from the testimony given by one of the defendants [*Debs*] before the United States Strike Commission, which is sufficient answer to this suggestion:

"As soon as the employes found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had been permitted to remain upon the field, among them. Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work. . . . Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up, . . . not by the army, and not by any other power, but simply and solely by the action of the United States courts in re-

straining us from discharging our duties as officers and representatives of our employees."

Whatever any single individual may have thought or planned, the great body of those who were engaged in these transactions contemplated neither rebellion nor revolution, and when in the due order of legal proceedings the question of right and wrong was submitted to the courts, and by them decided, they unhesitatingly yielded to their decisions. The outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and in accordance with the settled conviction of all citizens is committed the determination of questions of right and wrong between individuals, masses, and states.

It must be borne in mind that this bill was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried. And the facts set forth at length are only those facts which tended to show that the defendants were engaged in such obstructions.

A most earnest and eloquent appeal was made to us in eulogy of the heroic

spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defense of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the co-operation of a mob, with its accompanying acts of violence. . . .

We enter into no examination of the Act of July 2, 1890 [Sherman Anti-Trust Act] upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the Act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed.

The petition for a writ of *habeas corpus* is

*Denied.*³

³ Debs accepted the "ballot box" admonition of the Court; at least he became a Socialist leader after his release from jail.

The federal government did not use the injunction method against a railway strike again till 1922 (though it used it against a coal strike in 1919). The 1922 order was far more sweeping than that of 1894, as can be seen in the comparison made by Frankfurter and Greene, *The Labor Injunction*, pp. 62-63, 253-63.—C.R.

FRANK & DUGAN v. HEROLD

Court of Chancery of New Jersey. 1902.

63 N. J. Eq. 443; 52 Atl. 152.

PITNEY, V. C.

[In 1883 the New Jersey legislature passed an act making it *lawful* for per-

sons to unite to persuade others to agree to leave or enter anyone's employment (or not to do so). Being held for contempt

of an injunction against picketing, the defendants cited the law of 1883 and urged that the injunction be modified or canceled.]

In my judgment the true construction of the act of 1883 is simply that it renders innocent, as against the public, an act which, previous to its passage, was a misdemeanor and punishable by indictment. It does not take away, or in anywise affect any private rights [to damages or an injunction] which may arise out of acts which are legalised by that legislation. . . .

Moreover, if the legislature should declare lawful an act which in itself is an invasion of private rights and inflicts upon an individual an actionable injury, such legislation would be unconstitutional. . . .

It is urged that one person has a right to *persuade* another to work or not to work. That may be if the other person is willing to listen and be persuaded; but no person has a right to impose upon another his arguments or persuasions against the willingness of that other person to listen. . . .

Applying these principles to the case in hand, the parties defendant are charged by these affidavits with accosting, annoying and molesting, in various ways certain female operatives of the complainants while on their way to and from their work, and also in their homes.

Now, these female operatives, in my judgment, have the right to walk the streets entirely unmolested, without being jostled beyond what is necessary for the ordinary purposes of travel; without having faces made at them; without having epithets cast at them, or in fact, anything done to make it disagreeable for them to go to and from their work. They have the right to walk the streets to and from their work precisely as if there were no strike at Frank & Dugan's mill, and precisely as any ordinary respectable female would have the right to do. . . .

The next question is, What standing does that give the complainants, Frank &

Dugan, in this court? What right have Frank & Dugan to come here with their bill of complaint seeking to protect these females in the exercise of their undoubted right to walk the streets of Paterson unmolested? The answer to that question is that they are the *servants* of Frank & Dugan. The relation of *master* and *servant* exists between them; and to make out the existence of that relation I desire to say that I do not conceive it at all necessary that there should be a contract in writing, or even verbal, between them to work for any particular length of time. The relation of master and servant, in my judgment, clearly exists when the one person is willing, from day to day, to work for another, and that other person desires the labor and makes his business arrangement accordingly. Now, we all know that these large manufacturing establishments are carried on in reliance upon the daily attendance of numerous operatives, and that the non-attendance of those operatives brings the whole machinery to a stop at once. Their non-attendance has the same effect upon the carrying out of the whole plant as would the disabling of a part of the steam engine driving the machinery of the plant. The work of these operatives is part of the whole operation, and the proprietors of these establishments rely upon it without any written contract with their operatives. . . .

Now, the relation of master and servant being shown to exist, the law is quite clear that no person has a right to entice away another's servant, or to prevent him from performing his duties as servant. . . .

The operatives have the right, which their employers cannot complain of, to consider the question whether they desire to work for them any longer; and for that purpose they have the right to listen to arguments on that subject. And if the defendants wish to use those arguments, with the consent of the operatives, or if they wish to induce the operatives to lis-

ten to their arguments, they must hire an auditorium, as other persons would who desire to influence public sentiment—publish their notices, and invite these young ladies to come and hear them. . . .

Now, this being so, the next question is, What right have the complainants here in this court asking for the restraining power of the court? Why, the answer to that is twofold. First, it is quite plain that the relief in damages to be recovered in an action at law is entirely inadequate. It is quite absurd to say that they can sue each of these persons and recover damages against them in separate suits for every

little act which in the aggregate, tends to result in injury. And, in the second place, the injury is continuing and irreparable, and not capable of admeasurement according to legal principles. So that, at law, the remedy is entirely inadequate. It is therefore a clear case for the interposition of a court of equity to exercise its preventive remedy; and that is the particular sphere, at this day, of a court of equity, as contradistinguished from a court of law. It prevents injury. It does not give damages for injuries already sustained, but it prevents an injury from being inflicted. . . .

INJUNCTIONS AND OTHER LEGAL WARNINGS

In the *Frank* case, just quoted from, the apparent existence of intimidation led to a general ban on union activity; avenues of peaceful communication were shut off under cover of preventing violence, as we have seen it happen in the policing cases quoted from earlier. Similarly, when the national coal strike of 1922 spread to Somerset County, Pennsylvania, past scenes of violence were invoked to forbid free communication in the present.

* * * *

[Somerset coal companies had] the following equipment: three hundred and forty-eight deputies, enrolled by Sheriff Griffith at \$1 per day per head, commanded and paid by the coal companies; coal and iron policemen, enrolled by the state, paid by the companies to whom assigned; state troopers, not numerous but much feared, some taking orders from the irresponsible Bentley, others refusing to break up meetings; "spotters," in chairs in pool rooms, at telephone switchboards or crouched under the windows or racing

the roads in motors; they had such handy-men as an occasional priest to preach that strike meant damnation. As properties for the Somerset scene they had no-trespass notices on poles, fences and trees; burgesses' warnings on walls in towns; sheriff's proclamations all over the country. There was a lack of good lock-ups; "arrested" organizers and miners had to be taken to the county jail in Somerset town.

After April 19 they had injunctions; one sort was granted by Common Pleas Judge John Berkey. . . . An impressive document. Two printed pages.

Now therefore we command you, the said John Brophy, President District No. 2, United Mine Workers of America, James Marks, vice-President of said organization.

With 11 lines of names whose very printing rouses suspicion:

Clarence Donaldson, . . . Borten, . . . Mallon, Powers, Hapgood, . . . Taylor, Houck, Dave Leak or Lake.

Really a "toothless" injunction against a man who has seen injunctions before but to the isolated miner in the camps a different matter. The companies printed the writ by the thousand and their officials "served" the papers on the miners in their

¹ Heber Blankenhorn, *The Strike for Union: A Study of the Non-union Question in Coal and the Problems of a Democratic Movement, Based on the Record of the Somerset Strike, 1922-23* (New York: The H. W. Wilson Company, 1924, published for the Bureau of Industrial Research), pp. 29-30, 79-81. Used by permission.—C.R.

houses; sometimes pleasantly, "Sorry boys but I guess that fixes you," sometimes unpleasantly, "Now you sons of bitches, you can walk to the mine and back home and that's all."

The other printed injunction, on a single sheet, began blackbrowed with heavy type and ended:

And this as you shall answer the contrary at your peril.

BY THE COURT,
WM. H. RUPPEL.
P. J.

Somerset, Pa. Nov. 14th, 1916.

Coal companies worked this paper in the Hooversville region. This injunction was the relic of a strike five years dead. The signing judge was dead. Two of the men enjoined were dead. The fraud was used particularly against foreign-speaking miners. A Hungarian who noticed the document's date was nevertheless instructed by the company's borough officer, "This thing counts now. It means you fellows can't do nothing." . . .

Questions of tonnage and other pay rates, conditions, terms of settlement were quite submerged by such questions as: what were the men's rights in relation to law officers, in relation to meetings and circulation, to post offices; and to their houses. The ordinary questions of human rights in a democracy were uppermost. At times the discussions of the men reminded one of 1776; and organizers' speeches read like pages out of histories of the American revolution. The men were asking: had they a right to take that man to Somerset (the jail) without showing papers (a warrant)? Will he get a trial? Have they a right to tell me I gotta stay home? Can they set me out (evict) on just this paper?

Union support in strikes besides leadership chiefly concerns (1) jobs; late in the summer the union found jobs for thousands by moving them to settled union fields but in April the object everywhere was of course to keep all men off the job

of mining; or (2) shelter and food; by autumn the union was supplying relief wholesale; and (3) protection: at the start, against fear. Accomplishing the last was the first task; the leaders in Somerset used: (1) a fairly vigorous resort to the law; (2) more vigorous publicity.

Union use of these two democratic methods in mine strikes in the past had not always been altogether notable. Some even of the old organizers at first laughed themselves limp at young Hapgood: "He thinks he's got constitootshun rights in Somerset. He wants to have the Burgess arrested for putting him in the lockup without a warrant." When Hapgood told some gunmen that neither he "nor any other gentleman would stand for being called a son a —," such assumptions of common decency in Somerset were a killing climax to his companions. But the leaders began to make the legality of the union acts a weapon of offense. Hapgood's burgess and numbers of guards were arrested; so was a millionaire mine owner, D. B. Zimmerman, when he took to firing a rifle. The leaders did not rest with warning the strikers against violence; they called on sheriffs, state police sergeants and the governor incessantly to enforce their legal rights. Sometimes the immediate results were little enough; the guards often got off with no greater penalty than an admonition; Governor Sproul sniffed; the injunction with which District No. 2 and the Civil Liberties Union opened up Vintondale was set aside the same day. But the policy worked a real change in the quality of Somerset "law and order." In April company law officers were free and easy with clubs and manacles; to dump a pail of water out of D. B. Zimmerman's office window upon the head of Mr. Mark was Somerset manners. In late summer arrested burgesses were hoping union leaders "would drop the case"; Somerset operators remarked that "the organizers had been law-abiding, acted like gentlemen."

And the Somerset jail windows ceased to be packed with miners' heads. Simply having a legal staff on the job,—it was headed by the district attorney of a union county,—insured legal recourse for hundreds of nameless strikers and demolished the "riot psychology" growing out of the guards' activities. This staff made ineffective for a time the injunction obtained by the operators' association and

turned the hearings into an exposure of non-union injustices. An injunction to restrain the operators was never attempted, nor was the operators' injunction fought through to a finish. But the defensive measures at law "gave a great many simple people of many nationalities, long regarded as a 'bunch of ignorant foreigners,' the new experience of having rights and of having them defended."

TRUAX *v.* CORRIGAN

Supreme Court of the United States. 1921.
257 U. S. 312; 42 Sup. Ct. 124; 66 L. Ed. 254.

This case arose out of a dispute over wages and conditions of work between a keeper of a restaurant in Bisbee, Arizona, and his cook and waiters. A strike was called. The plaintiff claimed that the action of the strikers caused irreparable injury to his business. The defendants relied for immunity on Paragraph 1464 of the Revised Statutes of Arizona, enacted in 1913 and almost identical in language with the federal Clayton Act of 1914, which is reported below. The statute provided that no injunction should be granted in any case between employer and employees, involving or growing out of conditions of employment, unless irreparable injury to a property right was threatened. The plaintiff urged that this statute was unconstitutional and asked for an injunction. A lower state court declined to issue one, and this decision was sustained by the Supreme Court of Arizona. The case was appealed to the Supreme Court of the United States.

* * * *

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court. . . .

The complaint and its exhibits make this case:

The defendants conspired to injure and destroy plaintiffs' business by inducing their theretofore willing patrons and would-be patrons not to patronize them and they influenced these to withdraw or withhold their patronage:

(1) By having the agents of the union

walk forward and back constantly during all business hours in front of plaintiffs' restaurant and within five feet thereof, displaying a banner announcing in large letters that the restaurant was unfair to cooks and waiters and their union.

(2) By having agents attend at or near the entrance of the restaurant during all business hours and continuously announce in a loud voice, audible for a great distance, that the restaurant was unfair to the labor union.

(3) By characterizing the employees of the plaintiffs as scab Mexican labor, and using opprobrious epithets concerning them in handbills continuously distributed in front of the restaurant to would-be customers.

(4) By applying in such handbills abusive epithets to Truax, the senior member of plaintiffs' firm, and making libelous charges against him, to the effect that he was tyrannical with his help, and chased them down the street with a butcher knife, that he broke his contract and repudiated his pledged word; that he had made attempts to force cooks and waiters to return to work by attacks on men and women; that a friend of Truax assaulted a woman and pleaded guilty; that plaintiff was known by his friends, and that Truax's treatment of his employees was

explained by his friend's assault; that he was a "bad actor."

(5) By seeking to disparage plaintiff's restaurant, changing that the prices were higher and the food worse than in any other restaurant, and that assaults and slugging were a regular part of the bill of fare, with police indifferent.

(6) By attacking the character of those who did patronize, saying that their mental calibre and moral fibre fell far below the American average, and enquiring of the would-be patrons—Can you patronize such a place and look the world in the face?

(7) By threats of similar injury to the would-be patrons—by such expressions as "All ye who enter here leave all hope behind." "Don't be a traitor to humanity"; by offering a reward for any of the ex-members of the union caught eating in the restaurant; by saying in the handbills: "We are also aware that handbills and banners in front of a business house on the main street give the town a bad name, but they are permanent institutions until William Truax agrees to the eight-hour day."

(8) By warning any person wishing to purchase the business from the Truax firm that a donation would be necessary, amount to be fixed by the District Trades Assembly, before the picketing and boycotting would be given up.

The result of this campaign was to reduce the business of the plaintiffs from more than \$55,000 a year to one of \$12,000.

Plaintiffs' business is a property right . . . and free access for employees, owner, and customers to his place of business is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort [a wrong punishable by damages]. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful. . . . Intention to inflict the loss and the actual loss caused are clear. The real question here is, were the means used illegal? The

above recital of what the defendants did can leave no doubt of that. The libelous attacks upon the plaintiffs, their business, their employees, and their customers, and the abusive epithets applied to them were palpable wrongs. They were uttered in aid of the plan to induce plaintiffs' customers and would-be customers to refrain from patronizing the plaintiffs. The patrolling of defendants immediately in front of the restaurant on the main street and within five feet of the plaintiffs' premises continuously during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the entrance to the restaurant and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees, plaintiffs and customers, and the threats of injurious consequences to future customers, all linked together in a campaign, were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business. It was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. No wonder that a business of \$50,000 was reduced to only one-fourth of its former extent. Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction and it thus was plainly a conspiracy. . . .

A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and can not be held

valid under the Fourteenth Amendment. . . . It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.

It is to be observed that this is not the mere case of a peaceful secondary boycott as to the illegality of which courts have differed and States have adopted different statutory provisions. A secondary boycott of this kind is where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats of similar injury. In such a case the many have a legal right to withdraw their trade from the one, they have the legal right to withdraw their trade from third persons, and they have the right to advise third persons of their intention to do so when each act is considered singly. The question in such cases is whether the moral coercion exercised over a stranger to the original controversy by steps in themselves legal becomes a legal wrong. But here the illegality of the means used is without doubt and fundamental. The means used are the libelous and the abusive attacks on the plaintiffs' reputation, like attacks on the employees and customers, threats of such attacks on would-be customers, picketing and patrolling of the entrance to their place of business, and the consequent obstruction of free access thereto—all with the purpose of depriving the plaintiffs of their business. To give operation to a statute whereby serious losses inflicted by such unlawful

means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law. . . .

This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the Amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause, brought down from Magna Charta, was found in the early state constitutions, and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. . . .

It is beside the point to say that plaintiffs had no vested right in equity relief and that taking it away does not deprive them of due process of law. If, as is as-

serted, the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction. . . .

If, as claimed, the legislature has full discretion to grant or withhold equitable relief in any class of cases, indeed to take away from its courts all equity jurisdiction and leave those who are wronged to suits at law or to protection by the criminal law, the legislature has the same power in respect to the declaration of crimes. Suppose the legislature of the State were to provide that such acts as were here committed by defendants, to wit, the picketing or patrolling of the sidewalk and street in front of the store or business house of any person and the use of handbills of an abusive and libelous character against the owner and present and future customers with intent to injure the business of the owner, should be a public nuisance and be punishable by fine and imprisonment, and were to except ex-employees from its penal provisions. Is it not clear that any defendant could escape punishment under it on the ground that the statute violated the equality clause of the Fourteenth Amendment? . . . Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be. . . .

To sustain the distinction here between the ex-employees and other tort feors [that is, others who injure the firm] in the matter of remedies against them, it

is contended that the legislature may establish a class of such ex-employees for special legislative treatment. In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary and that questions of proper classification are not free from difficulty. But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility, having no special relation to each other, in respect of remedial procedure for an admitted tort [that is, a wrong other than a breach of contract] been sustained. Classification must be reasonable. . . . Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in *Muller v. Oregon*, 208 U. S. 412, that "it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."

It is urged that this court has frequently recognized the special classification of the

relation of employees and employers as proper and necessary for the welfare of the community and requiring special treatment. This is undoubtedly true, but those cases, . . . as we have already pointed out in discussing the due process clause, were cases of the responsibility of the employer for injuries sustained by employees in the course of their employment. The general end of such legislation is that the employer shall become the insurer of the employee against injuries from the employment without regard to the negligence, if any, through which it occurred, leaving to the employer to protect himself by insurance and to compensate himself for additional cost of production by adding to the prices he charges for his products. It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employee on the business and property right of the employer. It is really a little difficult to say, if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the State may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults and leaving the assaulted persons to suits for damages at common law? . . .

It is urged that in holding Paragraph 1464 invalid, we are in effect holding invalid §20 of the Clayton Act. Of course, we are not doing so. In the first place, the

equality clause of the Fourteenth Amendment does not apply to congressional but only to state action. In the second place, §20 of the Clayton Act never has been construed or applied as the Supreme Court of Arizona has construed and applied Paragraph 1464 in this case.

We have but recently considered the clauses of §20 of the Clayton Act, sometimes erroneously called the "picketing" clauses. *American Steel Foundries v. Tri-City Trades Council* [257 U. S. 184]. . . .

We held that under these clauses picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms which the statute scoundrelously avoided, but that, subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by violence, intimidation, annoyance, importunity or dogging, it was lawful for ex-employees on a strike and their fellows in a labor union to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably to persuade the employees and would-be employees to join them in it. We held that these clauses were merely declaratory of what had always been the law and the best practice in equity, and we thus applied them. The construction put upon the same words by the Arizona Supreme Court makes these clauses of Paragraph 1464 as far from those of §20 of the Clayton Act in meaning as if they were in wholly different language. . . .

The judgment of the Supreme Court of Arizona is reversed. . . .

MR. JUSTICE HOLMES, dissenting.

. . . By calling a business "property" you make it seem like land and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly

is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm. I cannot understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employees' or the employers' interest by statute when the same result has been reached constitutionally without statute by Courts with whom I agree. . . .

I think further that the selection of the class of employers and employees for special treatment, dealing with both alike, is beyond criticism on principles often asserted by this Court. And especially I think that without legalizing the conduct complained of the extraordinary relief by injunction may be denied to the class. Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases. . . .

I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. . . .

MR. JUSTICE BRANDEIS, dissenting. . . .

The earliest reported American decision on peaceful picketing appears to have been rendered in 1888; the earliest on boycotting in 1886. By no great majority the prevailing judicial opinion in America declares the boycott as commonly prac-

ticed an illegal means (see *Duplex Printing Press Co. v. Deering*, 254 U. S. 443), while it inclines towards the legality of peaceful picketing. See *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184. But in some of the States, notably New York, both peaceful picketing and the boycott are declared permissible. Judges, being thus called upon to exercise a quasi-legislative function and weigh relative social values, naturally differed in their conclusions on such questions.

In England, observance of the rules of the contest has been enforced by the courts almost wholly through the criminal law or through actions at law for compensation. An injunction was granted in a labor dispute as early as 1868. But in England resort to the injunction has not been frequent and it has played no appreciable part there in the conflict between capital and labor. In America the injunction did not secure recognition as a possible remedy until 1888. When a few years later its use became extensive and conspicuous, the controversy over the remedy overshadowed in bitterness the question of the relative substantive rights of the parties. In the storms of protest against this use many thoughtful lawyers joined. The equitable remedy, although applied in accordance with established practice, involved incidents which, it was asserted, endangered the personal liberty of wage-earners. The acts enjoined were frequently, perhaps usually, acts which were already crimes at common law or had been made so by statutes. The issues in litigation arising out of trade disputes related largely to questions of fact. But in equity issues of fact as of law were tried by a single judge, sitting without a jury. Charges of violating an injunction were often heard on affidavits merely, without the opportunity of confronting or cross-examining witnesses. Men found guilty of contempt were committed in the judge's discretion, without either a statu-

tory limit upon the length of the imprisonment, or the opportunity of effective review on appeal, or the right to release on bail pending possible revisory proceedings. The effect of the proceeding upon the individual was substantially the same as if he had been successfully prosecuted for a crime; but he was denied, in the course of the equity proceedings, those rights which by the Constitution are commonly secured to persons charged with a crime.

It was asserted that in these proceedings an alleged danger to property, always incidental and at times insignificant, was often laid hold of to enable the penalties of the criminal law to be enforced expeditiously without that protection to the liberty of the individual which the Bill of Rights was designed to afford; that through such proceedings a single judge often usurped the functions not only of the jury but of the police department; that in prescribing the conditions under which strikes were permissible and how they might be carried out, he usurped also the powers of the legislature; and that incidentally he abridged the constitutional rights of individuals to free speech, to a free press and to peaceful assembly.

It was urged that the real motive in seeking the injunction was not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. In other words, that under the guise of protecting property rights, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the State on one side or the other according to principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its

own; and that pending the ascertainment of new principles to govern industry, it was wiser for the State not to interfere in industrial struggles by the issuance of an injunction.

After the constitutionality and the propriety of the use of the injunction in labor disputes was established judicially, those who opposed the practice sought the aid of Congress and of state legislatures. The bills introduced varied in character and in scope. Many dealt merely with rights; and, of these, some declared, in effect, that no act done in furtherance of a labor dispute by a combination of workingmen should be held illegal, unless it would have been so, if done by a single individual; while others purported to legalize specific practices, like boycotting or picketing. Other bills dealt merely with the remedy; and of these, some undertook practically to abolish the use of the injunction in labor disputes, while some merely limited its use either by prohibiting its issue under certain conditions or by denying power to restrain certain acts. Some bills undertook to modify both rights and remedies. These legislative proposals occupied the attention of Congress during every session but one in the twenty years between 1894 and 1914. Reports recommending such legislation were repeatedly made by the Judiciary Committee of the House or that of the Senate; and at some sessions by both. Prior to 1914, legislation of this character had at several sessions passed the House; and in that year Congress passed and the President approved the Clayton Act, §20 of which [it is reported below] is substantially the same as Paragraph 1464 of the Arizona Civil Code. . . .

Such was the diversity of view concerning peaceful picketing and the boycott expressed in judicial decisions and legislation in English-speaking countries when in 1913 the new State of Arizona, in establishing its judicial system, limited the use of the injunction and when in

1918 its Supreme Court was called upon to declare for the first time the law of Arizona on these subjects. The case of *Truax v. Beebe Local No. 380*, 19 Ariz. 379, presented facts identical with those of the case at bar. In that case the Supreme Court made its decision on four controverted points of law. In the first place, it held that the officials of the union were not outsiders with no justification for their acts (19 Ariz. 379, 390). In the second place, rejecting the view held by the federal courts and the majority of the state courts on the illegality of the boycott, it specifically accepted the law of New York, Montana and California, citing the decisions of those States (19 Ariz. 379, 388, 390). In the third place it rejected the law of New Jersey, Minnesota and Pennsylvania that it is illegal to circularize an employer's customers, and again adopted the rule declared in the decisions of the courts of New York, Montana, California and Connecticut (19 Ariz. 379, 389). In deciding these three points the Supreme Court of Arizona made a choice between well-established precedents laid down on either side by some of the strongest courts in the country. Can this court say that thereby it deprived the plaintiff of his property without due process of law?

The fourth question requiring decision was whether peaceful picketing should be deemed legal. Here, too, each of the opposing views had the support of decisions of strong courts. If the Arizona Court had decided that by the common law of the State the defendants might peacefully picket the plaintiffs, its decision, like those of the courts of Ohio, Minnesota, Montana, New York, Oklahoma and New Hampshire, would surely not have been open to objection under the Federal Constitution; for this court has recently held

that peaceful picketing is not unlawful. *American Steel Foundries v. Tri-City Central Trades Council* [257 U. S. 184 (1921)]. The Supreme Court of Arizona found it unnecessary to determine what was the common law of the State on that subject, because it construed Paragraph 1464 of the Civil Code as declaring peaceful picketing to be legal.

. . . But even if this court should hold that an employer has a constitutional right to be free from interference by such a boycott or that the picketing practiced was not in fact peaceful, it does not follow that Arizona would lack the power to refuse to protect that right by injunction. . . .

A State is free since the adoption of the Fourteenth Amendment, as it was before, not only to determine what system of law shall prevail in it, but, also, by what processes legal rights may be asserted, and in what courts they may be enforced. . . .

Nor is a State obliged to protect all property rights by injunction merely because it protects some, even if the attending circumstances are in some respects similar. The restraining power of equity might conceivably be applied to every intended violation of a legal right. On grounds of expediency its application is commonly denied in cases where there is a remedy at law which is deemed legally adequate. But an injunction has been denied on grounds of expediency in many cases where the remedy at law is confessedly not adequate. . . . Thus, courts ordinarily refuse, perhaps in the interest of free speech, to restrain actionable libels. . . .

[The dissenting opinion of Mr. JUSTICE PITNEY, with which Mr. JUSTICE CLARKE concurred, is omitted.]

THE LABOR CLAUSES OF THE CLAYTON ACT ¹

38 Stat. 730, 731, 738; 29 U. S. C. §§38, 52.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of

the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

[Approved, October 15, 1914.]

THE NORRIS-LAGUARDIA ACT
(*The Federal Anti-Injunction Law of 1932*)

47 Stat. 70; 29 U. S. C. §§101-15.

An Act to amend the Judicial Code and to define and limit the jurisdiction of

courts sitting in equity, and for other purposes.

¹ Section 16 gave private parties the power to ask for injunctions under the anti-trust laws. Section 17 provided that no preliminary injunction might be issued without notice to the other side. Section 22 provided that, in cases of contempt of court arising from the wilful disobedience of an order of the court, the accused was entitled to a jury trial, if his action had been a crime under the laws of the United States or of the local state. The last provision was upheld in *Michelson v. U. S.*, 266 U. S. 42, 45 Sup. Ct. 18 (1924).—C.R.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act.

SEC. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

SEC. 3. Any undertaking or promise,

such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding

from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

SEC. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

SEC. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such

acts, or of ratification of such acts after actual knowledge thereof.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect com-

plainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

SEC. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with

any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SEC. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

SEC. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

SEC. 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts

committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

SEC. 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

SEC. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employees; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

SEC. 14. If any provision of this Act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

SEC. 15. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

Approved, March 23, 1932.

Decisions which interpret the federal anti-injunction law and the similar state laws will be reported in Chapter 3—the *Senn*, the *Lauf*, the *New Negro*, the *Wilson*, the *Fur Workers*, the *Rohde*, the *Opera on Tour*, and the *Hutcheson* cases. Under these laws, if the company attorney hopes to get an injunction against peaceful union actions, he must try to show that the controversy is not a

"labor dispute," that is, that it falls outside the scope of the anti-injunction law and that therefore the judge may forbid even peaceful persuasion if the union's project seems to him to be basically unreasonable—unless indeed the Constitution prevents the judge from forbidding peaceful communication, as it was held to do by the Supreme Court in *A. F. L. v. Swing*, reported in Chapter 3.

In cases involving intimidation by unionists the company attorney has the problem of adapting himself to the procedural restrictions imposed by the anti-injunction law. One of these may be selected for special mention. The tradition of the equity courts is that the complainant may not ask equity if he has not done equity to the other side—he must come into court with clean hands. The vague traditional rule is reinforced by Section 8 of the federal anti-injunction law. A union might plead that the company had not fulfilled its legal obligations because it was violating the National Labor Relations Board in its conduct toward the union, perhaps specifically by refusing to bargain with a union approved by a majority of the employees. Or the union might object that the company had not, before seeking an injunction, tried mediation or arbitration.¹

In the case of *Fansteel v. Lodge 66*, reported just below, the union raised such a point, but not under an anti-injunction law. It took the line that the company's suit should be rejected because the company had failed to bargain with it, but it stated it in the extreme form that the National Labor Relations Board had jurisdiction over the

whole matter and the state court was powerless to intervene.

Another anti-injunction-law problem relating to intimidation is raised by companies' contention that a union which uses it forfeits its rights under the anti-injunction law, so that the company does not have to bother with the procedures specified in that law and may be able to persuade the judge (since the law is to be disregarded) to forbid peaceful picketing as well as intimidation. This contention, in the form of an argument that a controversy was no longer a "labor dispute" under the act after violence was used, was rejected by the Supreme Court in the *Lauf* case in 1938.² Similarly, it has been argued that unionists who use violence forfeit the freedom to picket secured to other unionists by the anti-injunction law. This argument was accepted by the Court of Appeals of New York State in the *Busch* case, 281 N. Y. 150, 22 N. E. (2d) 320 (1939), applying the New York anti-injunction law; but a year later, after a shift in its membership, this court limited the rule to cases in which the evidence showed that the union was incapable of conducting peaceful picketing. *May's Furs v. Bauer*, 282 N. Y. 331, 26 N. E. (2d) 279 (1940).

A possible attitude to take toward that question is that the Constitution protects peaceful communication, so that, whether or not the state has an anti-injunction law, its courts may not forbid communication itself but only forbid the violence, if any. This attitude was taken by the minority but rejected by the majority of the Supreme Court in 1941 in *Milk Wagon Drivers v. Meadowmoor Dairies*, reported below.

¹ Such an objection was rejected by a circuit court of appeals, after long-drawn-out litigation, in *Donnelly Garment Company v. I. L. G. W. U.*, 99 Fed. (2d) 309 (1939). The Supreme Court refused to review the matter.—C.R.

² Stein and others, *Labor Problems in America*, op. cit., pp. 635-36.—C.R.

FANSTEEL METALLURGICAL CORPORATION v. LODGE 66

Illinois Appellate Court (2d District). 1938.

295 Ill. App. 323; 14 N. E. (2d) 991.

MR. PRESIDING JUSTICE DOVE delivered the opinion of the court.

This is an appeal by Meyer Adelman, Oakley Mills and thirty-seven other defendants from a decree which found appellants guilty of contempt of court for

violating a preliminary injunction which had been issued by the circuit court of Lake county on February 18, 1937.¹

¹ The same town and some of the same people were involved in the Chicago Hardware Foundry strike in 1938—reported above.—C.R.

The record discloses that the Fansteel Metallurgical Corporation is incorporated under the laws of the State of New York, that its properties consist of seven and one-half acres of ground located in North Chicago, upon which are fifteen buildings which house its machinery, equipment and inventories. It is engaged in the extraction of rare metals from ores and intermediate products, making tungsten, tantalum, molybdenum, rubidium, calcium and a line of battery chargers, rectifiers, transformers and carbide tools. On February 17, 1937, this company had three hundred and eighty persons in its employ in its plant. The appellants except Adelman and Mills were employees. Adelman and Mills were not employed by the Fansteel Corporation but were field directors for the steel workers' organizing committee of the Amalgamated Association of Iron, Steel and Tin Workers of North America. Their work as members of this organizing committee was to assist unorganized workers to organize themselves into labor unions and, so acting, an organization was formed among the employees of appellee designated as "Lodge 66 of the Amalgamated Association of Iron, Steel and Tin Workers of North America." On February 17, 1937, a committee from this Lodge held two conferences with the management of appellee and were advised by the factory superintendent that the policy of appellee was not to recognize the union which the committee represented. Thereupon the committee voted to cease work and to evidence their protest by striking and remaining in the buildings of the appellee where they were employed. About 2:30 o'clock on the afternoon of this day some ninety of the employees of appellee, who were in two of appellee's buildings, designated in the record as buildings three and five, stopped work, evicted their foremen and remained in possession of these two buildings, locked, wired and barricaded the doors from the

inside, refused to admit the officers and plant superintendents of appellee and continued to hold possession of these buildings by force for the ensuing 8 days. During the evening of February 17, 1937, representatives of appellee made a formal demand to be permitted to enter the buildings but their demand was refused by those inside, whereupon they were, by appellee's representatives, informed that those employees who were within the buildings were discharged. Written notices were also passed into the buildings notifying those in the buildings that appellee, upon the following morning, would file its complaint in the circuit court of Lake county and at that time would apply for a preliminary injunction restraining those in possession of appellee's property from continuing in their illegal occupancy thereof.

On February 18, 1937, the complaint in the instant cause was filed. It was verified by the president of appellee, its plant superintendent and its several department foremen. The complaint made Lodge 66 of the Amalgamated Association of Iron, Steel and Tin Workers of North America, the Steel Workers Organizing Committee of the Committee for Industrial Organization and some thirty-five individual defendants. All of the defendants entered their respective appearances by their attorneys and upon a hearing had, an order was entered, finding that the seizure of the buildings of appellee was illegal and that their occupancy constituted a continued trespass and the court issued a preliminary injunction directing the men who were occupying the buildings to vacate the same and restore possession thereof to appellee. The sheriff went to the plant to serve and execute this writ. Both buildings were locked and the men within refused to admit the sheriff. Some of those within however came to the open windows and the sheriff read the writ and explained its meaning and passed into the buildings at least

eighty copies of the writ and posted additional copies around the plant. The sheriff asked for the names of those who would accept service of the writ and appellant Swanson in one building said he would and either Swanson or some of the others inside the building advised the sheriff that Swanson was their leader. Appellant Warner apparently was the leader in the other building and is spoken of in the record as captain. The sheriff returned the writ stating in his return that it was duly served upon the defendants by reading the same to them and leaving about twenty-five copies thereof upon the premises occupied by the defendants; that he posted at least two copies of the writ on each building occupied by the defendants and left a copy thereof with Carl Swanson, Harold Dreyer and Frank Lutz. The following day appellee filed its verified petition reciting the foregoing and prayed for an attachment and rule to show cause. Upon a hearing the court ordered a writ of attachment to issue and directed the sheriff to bring the bodies of the men in possession of the premises of appellee before the court and a rule was entered upon them to show cause why they should not be held in contempt of court. Thereupon the sheriff and his deputies, with the writ of attachment, went to the buildings occupied by the employees but were unable to gain admission. The officers advised the men that they had a warrant for their arrest and requested that they come out of the buildings. They refused. The officers, numbering fifty, tried to effect a forcible entrance but in building number five streams of water from a hose were poured upon them, and in both buildings windows were broken, wire spools, bolts, drills and iron missiles of all kinds and sulphuric acid were thrown and poured upon the officers. One of the deputies was quite severely burned and several injured. On February 26, 1937, by the use of tear gas, the officers were finally suc-

cessful in forcibly evicting those in possession of the building.

On February 26, 1937, appellee filed its supplemental complaint and petition, which alleged the foregoing and charged that appellants, other than Adelman and Mills, had wilfully violated the previous orders of the court and had resisted with violence the efforts of the officers to enforce those orders and charged Adelman and Mills with having aided, assisted and facilitated the other appellants in unlawfully violating the orders of the court. A change of venue was taken from the chancellor who issued the preliminary injunction and after all of the defendants had answered, a hearing was had. The court found twenty-four of the appellants guilty and imposed a fine of \$100 upon each and committed each to the county jail for a period of 10 days. The court also found eleven of the appellants guilty and imposed a fine of \$150 upon each and committed each to jail for 120 days. The court found the appellants Warner and Swanson guilty and imposed a fine upon each of \$300 and committed each to jail for 180 days. Appellant Mills was found guilty and fined \$500 and committed to jail for 180 days and appellant Adelman was found guilty and fined \$1,000 and committed to jail for 240 days.

It is first insisted by counsel for appellants that the evidence discloses that this sit-down strike arose because of the refusal of appellee to bargain collectively with the representatives of its employees, that by so doing appellee violated the express provisions of the National Labor Relations Act which vested exclusive jurisdiction of all labor disputes affecting interstate commerce in the labor board created by that Act, that the circuit court of Lake county was therefore without jurisdiction to issue the preliminary injunction which forms the basis of this proceeding and being without jurisdiction, the order which it issued was void and being void, the chancellor was with-

out authority to punish for any disobedience thereof. . . .

There is nothing in the Wagner Act which deals with the subject of violence or any illegal acts committed by employees in the course of an industrial dispute and in our opinion Congress did not, by its enactment of the Wagner Act, deprive or attempt to deprive the States of their police power to protect property rights or punish illegal acts committed in the course of labor disputes nor do we think that there is any merit in the contention of appellants' counsel when they insist that equity cannot now have jurisdiction of any phase of the subject of the relations between employer and employee in a labor controversy affecting interstate commerce. The remedies available to either an employer or employee in a court of equity prior to the enactment of this act are still available and let us hope will continue to be. We might add that the question of the jurisdiction of the circuit court to issue this injunction was raised by appellants' counsel for the first time in this court. The record discloses that the question was not presented to the chancellor at any time by any motion, pleading or argument. It is evidently an afterthought.

It is next insisted that the evidence found in the record is not sufficient to support the finding and judgment against appellants Adelman and Mills. It will be recalled that Adelman and Mills were not employees of appellant. . . . The evidence is that Adelman was a field worker for the steel workers' organizing committee of the Amalgamated Association of Iron, Steel and Tin Workers of North America. He counseled and advised Lodge 66 and its members from its inception. Mills was his assistant. . . .

The evidence is further that while the unlawful occupancy of appellee's premises was in progress, large crowds of relatives, sympathizers and friends of the men who were in the buildings gathered

on the outside, during the day and also at nights, estimated by one witness from six to one hundred and upon one occasion as many as one thousand. Packages of food and clothing were sent into the buildings by means of ropes let down from windows. Those packages were inspected by the officers in order that no firearms or weapons might get to the men. Oakley Mills came to Waukegan in December, 1936, and assisted Adelman in his organizing work. He knew of the issuance of the injunction and testified that between February 17th and February 26th he was at the plant at least once, every day, and also at night, that he talked to the men in the buildings, supplied them with between 50 and 60 dollars' worth of food which he himself purchased and hoisted into the buildings. According to the weight of the testimony he was abusive and discourteous in his remarks to the officers, indulged in the most violent, obscene and indecent language toward them, invited them to come and fight him, stating that he came from the West Virginia coal mining regions where they had real strikes. The evidence is also that he, Mills, talked to Warner and Swanson and the other men in the buildings and advised them to hold their fort at all costs, that there was plenty of help outside and that they would win.

No one can read this record without coming to the conclusion that Adelman and Mills affirmatively and effectively and materially aided and abetted in the continued violation of the preliminary injunction which they knew had been issued. . . .

It is finally insisted that the punishment inflicted upon each of the appellants is oppressive and disproportionate to the offense committed. Counsel state that this cause was prosecuted before the chancellor upon the theory that those appellants who had been employees of appellee were trespassers and invaders of appellee's property and that these appel-

lants were animated only by malevolent purposes against their employer and by a desire upon their part to flout the courts and the law, that Adelman and Mills were severely sentenced because they were engaged in organization activities obnoxious to the social and economic views of the chancellor who imposed the sentences and that the chancellor seemed to be unable to distinguish between one acting in good faith and under claim of right, even though ill-advised and one acting from malicious motives and evil intent.

. . . Finding, as we do, that the court had jurisdiction to enter the order granting a preliminary injunction, it also had the power to lawfully enforce obedience

thereto and the power to enforce includes the power to impose penalties as a punishment for the defiance of its orders either by fines or by jail sentences or both. . . .

Judgment affirmed.

* * * *

The Illinois Supreme Court denied appeal, October 17, 1938. The United States Supreme Court also refused to take the case, February 27, 1939. It did however take up the National Labor Relations Board's case against the *Fansteel Corporation*. Its decision is reported in Chapter 5. This case too involved a problem of "clean hands," namely whether the union sit-downers came before the Board with clean hands when they asked the Board to order the company to reinstate them to their old jobs.

MILK WAGON DRIVERS *v.* MEADOWMOOR DAIRIES, INC.

Supreme Court of the United States. 1941.

— U. S. —; 61 Sup. Ct. 552; 85 L. Ed. 497.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The supreme court of Illinois sustained an injunction against the Milk Wagon Drivers Union over the latter's claim that it involved an infringement of the freedom of speech guaranteed by the Fourteenth Amendment. [Its opinion is reported in Chapter 3.] Since this ruling raised a question intrinsically important, as well as affecting the scope of *Thornhill v. Alabama*, 310 U. S. 88 [reported in Chapter 2], and *Carlson v. California*, 310 U. S. 106, we brought the case here. 310 U. S. 655.

The "vendor system" for distributing milk in Chicago gave rise to the dispute. Under that system, which was fully analysed in *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U. S. 91, milk is sold by the dairy companies to vendors operating their own trucks who resell to retailers. These vendors departed from the working standards theretofore achieved by the Union

for its members as dairy employees. The Union, in order to compel observance of the established standards, took action against dairies using the vendor system. The present respondent, Meadowmoor Dairies, Inc., brought suit against the Union and its officials to stop interference with the distribution of its products. A preliminary injunction restraining all union conduct, violent and peaceful, promptly issued, and the case was referred to a master for report. Besides peaceful picketing of the stores handling Meadowmoor's products, the master found that there had been violence on a considerable scale. [There were over] fifty instances of window-smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two

trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system were held with guns and severely beaten about the head while being told "to join the union"; carloads of men followed vendors' trucks, threatened the drivers, and in one instance shot at the truck and driver. In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings, there was testimony to identify the wrongdoers as union men. In the light of his findings, the master recommended that all picketing, and not merely violent acts, should be enjoined. The trial court, however, accepted the recommendations only as to acts of violence and permitted peaceful picketing. The reversal of this ruling by the supreme court, 371 Ill. 377, directing a permanent injunction as recommended by the master, is now before us.

The question which thus emerges is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution is invoked to deny Illinois the power to authorize its court to prevent the continuance and recurrence of flagrant violence, found after an extended litigation to have occurred under specific circumstances, by the terms of a decree familiar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.

The starting point is *Thornhill's* case.

That case invoked the constitutional protection of free speech on behalf of a relatively modern means for "publicizing, without annoyance or threat of any kind, the facts of a labor dispute." 310 U. S. 100. The whole series of cases defining the scope of free speech under the Fourteenth Amendment are facets of the same principle in that they all safeguard modes appropriate for assuring the right to utterance in different situations. Peaceful picketing is the workman's means of communication.

It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force.

In this case the master found "intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence," and the supreme court justified its decision because picketing, "in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the per-

sons in front of whose premises such picketing occurred and of causing them to believe that noncompliance would possibly be followed by acts of an unlawful character." It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window-smashings, of burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. Cf. *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436.

These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as

to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. And in exercising its power a state is not to be treated as though the technicalities of the laws of agency were written into the Constitution. Certainly a state is not confined by the Constitution to narrower limits in fashioning remedies for dealing with industrial disputes than the scope of discretion open to the National Labor Relations Board. It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondeat superior. *I. A. of M. v. Labor Board* . . . ; *Heinz Co. v. Labor Board* [both of which are reported in Chapter 5]. To deny to a state the right to a judgment which the National Labor Relations Board has been allowed to make in cognate situations, would indeed be distorting the Fourteenth Amendment with restrictions upon state power which it is not our business to impose. A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club.

We have already adverted to the generous scope that must be given to the guarantee of free speech. Especially is this attitude to be observed where, as in labor controversies, the feelings of even the most detached minds may become engaged and a show of violence may make still further demands on calm judgment.

THE BORDERS OF VIOLENCE

It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of dissociated acts of past violence. Nor may a state enjoin peaceful picketing merely because it may provoke violence in others. *Near v. Minnesota*, 283 U. S. 697, 721-22; *Cantwell v. Connecticut*, 310 U. S. 296. Inasmuch as the injunction was based on findings made in 1937, this decision is no bar to resort to the state court for a modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence. In the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language. According to the best practice, a judge himself should draw the specific terms of such restraint and not rely on drafts submitted by the parties. But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees. . . . We are here concerned with power and not with the wisdom of its exercise. We merely hold that in the circumstances of the record before us the injunction authorized by the supreme court of Illinois does not transgress its constitutional power. That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy. Compare *Busch Jewelry Co. v. United Retail Employees' Union*, 281 N. Y. 150, and *Baillis v. Fuchs*, 283 N. Y. 133.

To maintain the balance of our federal system, insofar as it is committed to our care, demands at once zealous regard for the guarantees of the Bill of Rights and due recognition of the powers belonging to the states. Such an adjustment requires austere judgment, and a precise summary

of the result may help to avoid misconstruction.

(1) We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell v. Connecticut*, 310 U. S. 296; *American Federation of Labor v. Swing*, [reported in Chapter 3,] this day decided. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill v. Alabama*, *supra*, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. "We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger." 310 U. S. 105. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved.

(2) The exercise of the state's power which we are sustaining is the very antithesis of a ban on all discussion in Chicago of a matter of public importance. Of

course we would not sustain such a ban. The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo. Compare *Nann v. Raimist*, 255 N. Y. 307. Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert. If an appropriate injunction were put to abnormal uses in its enforcement, so that encroachments were made on free discussion outside the limits of violence, as for instance discussion through newspapers or on the radio, the doors of this Court are always open.

(3) The injunction which we sustain is "permanent" only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not the last say. They must act in subordination to the duty of this court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers v. Florida*, 309 U. S. 227. Since the union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here.

(4) A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the

power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies the democratic process for legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution.

Affirmed.

MR. JUSTICE BLACK, dissenting.

In my belief the opinion just announced gives approval to an injunction which seriously infringes upon the constitutional rights of freedom of speech and the press. To such a result I cannot agree.

Before detailing the reasons for my disagreement, some preliminary observations will doubtless aid in clarifying the subsidiary issues. The right of the Illinois courts to enjoin violence is not denied in this case. And I agree that nothing in the federal Constitution deprives them of that right. But it is claimed that Illinois—through its courts—has here sanctioned an injunction so sweeping in its terms as to deny to petitioners and others their constitutional rights freely to express their views on matters of public concern. And this is the single federal question we must decide. In their brief, petitioners state that they "have never and do not at the present time in any way condone or justify any violence by any member of the defendant union. Petitioners did not object to the issuance of an injunction restraining acts of violence. There is no contention made that the act of the Chancellor in granting such an injunction was erroneous." . . .

In determining whether the injunction does deprive petitioners of their constitutional liberties, we cannot and should not lose sight of the nature and importance of the particular liberties that are at stake. And in reaching my conclusion I view the guaranties of the First Amendment¹ as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned.² Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. . . .

In this case, in order to determine whether or not the state has overstepped constitutional boundaries, I find it necessary to give consideration to a number of facts, including the nature of the proceedings; the definiteness, indefiniteness and constitutional validity of the basic law upon which the injunction is said to rest; the findings and the evidence; the definiteness, indefiniteness and scope of the language of the injunction itself; and the alleged imminence of the threatened dangers said to justify the admitted abridgment of free speech. My conclusion that the injunction as directed by the Supreme Court of Illinois invades the constitutional guaranties of freedom of speech and the press rests on my belief that these propositions are correct: (1) the subjects

banned from public discussion by the injunction are matters of public concern, touching which the Constitution guarantees the right of freedom of expression; (2) the law of Illinois, as declared by its Supreme Court, makes illegal the exercise of constitutionally guaranteed privileges, and is an inadequate basis upon which to defend this abridgment of free speech; (3) the rule upon which the injunction is supported here and which this Court now declares to be the Illinois law is not the rule upon which the Illinois Supreme Court relied; (4) the rule announced here as supporting the right of a state to abridge freedom of expression is so general and sweeping in its implications that it opens up broad possibilities for invasion of these constitutional rights; (5) in any event, the injunction here approved is too broad and sweeping in its terms to find justification under the rule announced by the Illinois court, and even though under other circumstances such an injunction would be permissible under the rule now announced by this Court, still in this case such an injunction is supported neither by the findings nor the evidence.

First. What petitioners were enjoined from discussing were matters of public concern "within that area of free discussion that is guaranteed by the Constitution." The controversy here was not a mere private quarrel between individuals, involving their interests alone. This injunction dealt with two conflicting methods of milk distribution—a matter of interest not only to Chicago's 148 dairies, their employees and their hundreds of retail outlets, but to the mass of milk consumers in the Chicago area as well. The older method of distribution, by which members of the petitioning union are employed, distributes a major part of the milk supply by door-to-door deliveries to the ultimate consumer. The rival method of distribution, in which respondent engages, takes two forms: the dairies using

¹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It is now too well settled to require citation that by the Fourteenth Amendment the guaranties of the First Amendment are protected against abridgment by the states.

² Thomas Jefferson, the great strategist of the campaign to bring about the adoption of the Bill of Rights, a campaign which he began even before the Constitution was adopted, said as to one of the guaranties of the First Amendment: "The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

this method sell their milk to "cut-rate" stores, either directly or through the medium of so-called "vendors." The cut-rate stores sell milk at a retail price two cents a quart less than that fixed by the dairies employing union labor. According to the court below, the system of cut-rate distribution, resulting in loss of business by the union dairies, loss of employment by the union drivers, and loss of a thousand members by the union itself, is at the root of a long-standing controversy. Not only this: the situation here is an intimate part of the larger problem of milk production and distribution throughout the country, and, indeed, of the still larger problem of all sorts of cut-rate distribution. There are thus involved trade practices which are not confined to Chicago alone—trade practices in which there is known to be a distinct cleavage in public thought throughout the nation.

Second. In essence, the Illinois Supreme Court held that it was illegal for a labor union to publicize the fact of its belief that a cut-rate business system was injurious to the union and to the public, since such publicity necessarily discouraged that system's prospective purchasers. This conclusion of the court was based on the following reasoning: The Fourteenth Amendment and the Due Process Clause of the Illinois Constitution, considered (in some way not made clear) in connection with the unwritten "common law," assure respondent the unqualified right to do business free from all unjustifiable interference; publication and peaceful argument intended to persuade respondent's customers that its methods of doing business were such that they should not buy the dairy's products were therefore illegal interference; the union's purpose to better working conditions of its members was no justification for its peaceful discussion of the controversy. Neither the presence nor the absence of violence was considered by the court to be a necessary element in its conclusion. All this was but

to say that in this controversy peaceful criticism of the "vendor system" was illegal because it might injure respondent's business by discouraging trade. But Illinois cannot without nullifying constitutional guaranties, make it illegal to marshal public opinion against these general business practices. An agreement so to marshal public opinion is protected by the Constitution, even though called a "common law" conspiracy or a "common law" tort. Despite invidious names, it is still nothing more than an attempt to persuade people that they should look with favor upon one side of a public controversy.

Third. But this Court sustains the injunction on the ground that the Illinois Supreme Court "justified its decision" by reference to violence, thereby indicating that that characteristic was made an essential element of the rule from which the injunction sprang. I do not so read that court's opinion, and apparently the Illinois Supreme Court itself does not so read it. That this is true is evidenced by that court's language in a later decision where, speaking of the present case, it said: "In that case there was some evidence of violence, but . . . the issue of violence was not the turning point of the decision."³ And even if violence were unintentionally included or incidentally referred to in the course of formulating a rule touching the right of free speech, such an unintentional inclusion or incidental reference is too uncertain a support upon which to rest a deprivation of this vital privilege.

Fourth. There is no state statute upon which either this Court or the Supreme Court of Illinois could have relied in sustaining the injunction.⁴ Assuming that

³ *Ellingsen v. Milk Wagon Drivers' Union*, 2 Labor Cases 567, 568 (not yet officially reported).

⁴ Illinois has an anti-injunction statute relating to matters involving labor disputes (Ill. Rev. Stat. 1939, chap. 48, §2[a]). The Supreme Court said that this statute was modeled on the federal Clayton Act (38 Stat. 738, 29 U. S. C. §52). But the

the Supreme Court of Illinois did declare the rule which this Court has adopted, in doing so it has not marked the limits of the rule with that clarity which should be a prerequisite to an abridgement of free speech. Nor do I believe that this Court, even if it should, has supplied that essential definiteness. What we are here dealing with is an injunction, and not a "statute narrowly drawn" to cover a situation threatening "imminent and aggravated danger."⁶ Speaking of a similar abridgement of constitutional rights where there was no guiding legislative act, we said in *Cantwell v. Connecticut*: "Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the state's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. . . . Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application" [310 U. S. 296, 307-8].

In the present case, the prohibition against the dissemination of information through peaceful picketing was but one of the many restraints imposed by the sweeping injunction. As to this one single element of the prohibitions a number of statements appear in the rule now formulated. On the one hand it is said that "disassociated acts of past violence" are not enough to forfeit the right of free speech. On the other hand a "back-ground of violence" appears to be sufficient. Nor are

any more definite standards or guides to be found in such clauses as "context of violence"; "entanglement with violence"; "coercive effect"; "taint of force"; and "coercive thrust." It is my apprehension that a rule embodying such broad generalizations opens up new possibilities for invasion of the rights guaranteed by the First Amendment.

Fifth. In my opinion the sweeping injunction here approved is justified by neither of the rules, and is not supported by the record.

For our purposes, in order to reach a proper conclusion as to just what is the sweep of the injunction, we must necessarily turn to the complaint, the answer, the evidence, the findings, and the decision and judgment of the Illinois courts. And whether the injunction will restrain the exercise of constitutional rights depends upon the effect it will have upon the minds of those whose freedom of expression might be abridged by its mandate. This effect in turn depends upon the language appearing upon the face of the injunction. By that language we must judge it. For this injunction does not run merely against lawyers who might give it a legalistic interpretation, but against laymen as well. Our question then becomes: To what extent will the layman who might wish to discuss or write about the prohibited subjects feel that he cannot do so without subjecting himself to the possibility of a jail sentence under a summary punishment for contempt? This injunction, like a criminal statute, prohibits conduct under fear of punishment. There is every reason why we should look at the injunction as we would a statute, and if upon its face it abridges the constitutional guaranties of freedom of expression, it should be stricken down. This is especially true because we must deal only with the federal question presented, which is whether petitioners have been denied their rights under the First Amendment. The injunction, like a statute, stands as an

court held that the facts here did not constitute the type of "labor dispute" to which the act applied, 371, Ill. at 383-386. Cf. *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U. S. 91.

⁶ *Thornhill v. Alabama*, 310 U. S. 88, 105.

overhanging threat of future punishment. The law of Illinois has been declared by its highest court in such manner as to infringe upon constitutional guaranties. And by this injunction that law as actually applied abridges freedom of expression. Looking at the injunction, we find that under pain of future punishment by a trial judge all of the members of the petitioning union (about six thousand) are prohibited "From interfering, hindering or otherwise discouraging or diverting, or attempting to interfere with, hinder, discourage or divert persons desirous of or contemplating purchasing milk and cream or other products aforesaid, including the use of said signs, banners or placards, and walking up and down in front of said stores as aforesaid, and further preventing the deliveries to said stores of other articles which said stores sell through retail; [or] From threatening in any manner to do the foregoing acts; . . ." It surely cannot be doubted that an act of the Illinois legislature, couched in this sweeping language, would be held invalid on its face.⁶ For this language is capable of being construed to mean that none of those enjoined can, without subjecting themselves to summary punishment, speak, write or publish anything anywhere or at any time which the Illinois court—acting without a jury in the exercise of its broad power to punish for contempt—might conclude would result in discouraging people from buying milk products of the complaining dairy. And more than that—if the language is so construed, those enjoined can be sent to jail if they even threaten to write, speak, or publish in such way as to discourage prospective milk purchasers. I find not even slight justification for an interpretation of this injunction so as to confine its prohibitions to conduct near stores dealing in respondent's milk.

⁶ Justice Black found that the injunction read much like the laws voided in *Thornhill v. Alabama*, 310 U. S. 88, and *Carlson v. California*, 310 U. S. 106.—C.R.

Neither the language of the injunction nor that of the complaint which sought the injunction indicates such a limitation. Mr. Justice Cardozo approved no such injunction as this in *Nann v. Raimist*, 255 New York 307. In fact, he ordered expunged from the injunction those prohibitions which impaired "defendant's indubitable right to win converts over to its fold by recourse to peaceable persuasion, and to induce them by like methods to renounce allegiance to its rival."

But the injunction approved here does not stop at closing the mouths of the members of the petitioning union. It brings within its all-embracing sweep the spoken or written words of any other person "who may . . . now . . . or hereafter . . . agree or arrange with them . . ." So, if a newspaper should "agree or arrange" with all or some of those here enjoined to publish their side of the controversy, thereby necessarily tending to "discourage" the sale of cut-rate milk, the publishers might likewise be subject to punishment for contempt.⁷ Ordinarily the scope of the decree is co-extensive with the allegations of the bill, its supporting affidavits or findings of fact. In other words, the acts enjoined are the acts alleged in the bill as the basis for complaint. And the complaint on which the injunction here rests specifically charged that the union had caused "announcement to be made by the public press of the City of Chicago, for the purpose of intimidating the said storekeepers and causing them to cease purchasing the milk sold by said

⁷ Cf. *Cohen v. United States*, 295 Fed. 633; *Taliaferro v. United States*, 290 Fed. 906, 214. Cohen, "the owner, editor, and publisher" of a newspaper, was convicted of contempt by the District Court under an injunction restraining "strikers and their sympathizers." The Circuit Court of Appeals reversed. *Taliaferro*, a barber in no way connected with a railroad strike, was convicted of contempt under an injunction restraining union members and those "associated with them." *Taliaferro's* offense consisted in placing in his window a sign saying "No scabs wanted in here." The Circuit Court of Appeals affirmed the conviction. And see *Illinois Malleable Iron Co. v. Michalek*, 279 Ill. 221.

plaintiffs through fear and terror of the renewal of said conspiracy, . . ." Specific reference was made to these newspaper stories as appearing in the *Chicago Tribune* and the *Chicago Evening American*. Proof was made of these publications. And the injunction of the trial judge, set aside by the Supreme Court of Illinois, specifically saved to petitioners—as in effect did Justice Cardozo in the New York case—their right to publicize their cause by means of "advertisement or communication." But the injunction sustained here is to be issued as prayed for in the bill of complaint. And since the acts enjoined are the acts alleged in the bill as the basis for complaint, newspaper publications of the type referred to in the complaint are literally enjoined. Since the literal language of the injunction, read in the light of the complaint, the supporting evidence, and the language of the trial judge's saving clause—stricken down by action sustained here—thus unconstitutionally abridges the rights of freedom of speech and press, we cannot escape our responsibility by the simple expedient of declaring that those who might be sent to jail for violating the plain language of the injunction might eventually obtain relief by appeal to this Court.

To sanction vague and undefined terminologies in dragnet clauses directly and exclusively aimed at restraining freedom of discussion upon the theory that we might later acquit those convicted for violation of such terminology amounts in my judgment to a prior censorship of views. No matter how the decree might eventually be construed, its language, viewed in the light of the whole proceedings, stands like an abstract statute with an overhanging and undefined threat to freedom of speech and the press. All this, of course, is true only as to those who argue on the side of the opponents of cut-rate distribution. No such undefined threat hangs over those who "agree or arrange" with the advocates of the cut-rate

system to encourage their method of distribution.

Nor is it any answer to say that the injunction would not be carried out in all its potential rigor. It was to obtain just these potentialities that respondent, already having secured from the trial court an injunction against acts of violence, appealed to the Illinois Supreme Court in order to secure an injunction broad enough to prevent petitioners' peaceable communication to the public of their side of the controversy. It is too much to expect that after complete approval of this abridgement of public discussion by the Supreme Court of Illinois, and after the opinion just announced, the injunction will not be enforced as written. So written, there could hardly be provided a more certain method wholly and completely to prevent all public discussion antagonistic to respondent's method of selling milk. And it is claimed by the members of petitioning union that foreclosure of opportunity for public discussion amounts to a death sentence for the method of business which gives them employment. The decision here thus permits state control by injunction as a substitute for competitive discussion of a controversy of particular interest to the union, and a matter of public concern as well.

A careful study of the entire record in this case convinces me that neither the findings nor the evidence, even viewed in the light most favorable to respondent, showed such imminent, clear and present danger⁸ as to justify an abridgement of the rights of freedom of speech and the press. The picketing, which did not be-

⁸ *Cantwell v. Connecticut*, 310 U. S. 296, 308; *Carlson v. California*, 310 U. S. 106, 113; *Herndon v. Lowry*, 301 U. S. 242, 258; *Schenck v. United States*, 249 U. S. 47, 52. And see the concurring opinion of Justices Holmes and Brandeis in *Whitney v. California*, 274 U. S. 357, 373, and the dissenting opinions of the same Justices in *Gillow v. New York*, 268 U. S. 652, 672-673; *Pierce v. United States*, 252 U. S. 239, 255; *Schaefer v. United States*, 251 U. S. 466, 482; and *Abrams v. United States*, 250 U. S. 616, 627.

gin until September, 1934, has at all times been peaceful. Usually one picket, and never more than two, walked along the street bearing a sign. The pickets never impeded traffic either on the sidewalks or in the street, nor did they disturb any passersby or customers. In fact, it is stipulated in the record that pickets "made no threats against any of these storekeepers, but peacefully picketed these stores. They made no attempt to stop any customers or to stop delivery except insofar as their situation and the signs they bore had that tendency." There was no evidence to connect them with any kind or type of violence at any time or place. As was found by the master, this was in accordance with the instruction which was given to them by the union officials. There is no evidence and no finding that dissemination of information by pickets stimulated anyone else to commit any act of violence.

There was evidence that violence occurred—some committed by identified persons and some by unidentified persons. A strike of farmers supplying most of Chicago's milk took place in the early part of January, 1934. This strike practically stopped the inflow of milk into the city. As a result, the union drivers were ordered not to report for work on January 8 and 9, at the height of the strike. It was during this period that the larger part of the major acts of violence occurred. According to the complaint and the evidence, seven trucks were seized or damaged on the 8th and 9th of January, 1934, and one on the 6th. These are the only trucks that were ever seized or damaged, according to both the complaint, and the evidence, and it was in connection with these seizures that the injuries to truck drivers, the shootings, and the threats referred to in this Court's opinion took place. Undoubtedly, some of the members of the union participated in this violence, as is shown by the fact that several were arrested, criminal prosecutions were instituted, and the cases later settled with the approval of

the trial judge. It was eight months after this before any picketing occurred; four years afterwards before the trial judge granted an injunction, limited to violence alone; five years before the Supreme Court of Illinois directed a more stringent injunction against peaceful persuasion; and seven years before this Court sustained the injunction.

During the period of the farmers' strike in 1934, and in the immediately succeeding months, five stores were either bombed or burned. Three union members were tried, convicted and sentenced to the penitentiary for arson in connection with one of these burnings. All of this violence took place many months before any of the picketing occurred. In addition to these 1934 acts of violence, the evidence showed that one stench bomb was thrown into a store in 1935, one in 1936, and two in 1937. The identity of the persons throwing these stench bombs was not shown.

The only other violence alleged or testified to was the breaking of windows in cut-rate stores. Most of the testimony as to these acts of violence was given by respondent's vendors and was extremely indefinite. The master made no findings as to specific acts of violence, nor as to the dates of their occurrence. Viewing the evidence in the light most favorable to respondent, however, all of the acts of violence as to which any testimony was offered are gathered in the accompanying footnote.⁹

⁹	Windows Broken	Trucks Seized	Stores Bombed or Burned	Miscellaneous
1934 . . .	34	8	5	4
1935 . . .	5	0	1	0
1936 . . .	7	0	1	0
1937 . . .	7	0	2	0
	53	8	9	4

Petitioners offered evidence that three men, with no union connections whatsoever, confessed to and were convicted of the smashing of windows in twenty-four cut-rate milk stores in 1934, pursuant to an insurance racket. The master struck this evidence from the record, on respondent's motion.

In addition to the acts of violence enumerated in the foregoing table, there was evidence of six acts

It is on the basis of my study of the entire record that I rest my conclusion that the forfeiture of the right to free speech effected by the injunction is not warranted. In reaching this conclusion, I fully recognize that the union members guilty of violence were subject to punishment in accordance with the principles of due process of law. And some of them have in fact been prosecuted and convicted. Punishment of lawless conduct is in accord with the necessities of government and is essential to the peace and tranquility of society. But it is going a long way to say that because of the acts of these few men, six thousand other members of their union can be denied the right to express their opinion to the extent accomplished by the sweeping injunction here sustained. Even those convicted of crime are not in this country punished by having their freedom of expression curtailed except under prison rules and regulations, and then only for the duration of their sentence.

No one doubts that Illinois can protect its storekeepers from being coerced by fear of damage to their property from window-smashing, or burnings or bombings. And to that end Illinois is free to use all its vast resources and powers, nor should this Court stand in the way so long as Illinois does not take away from its people rights guaranteed to them by the Constitution of the United States. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to pub-

lic safety, peace, or order appears, the power of the Illinois courts to prevent or punish is obvious. Furthermore, this is true because a state has the power to adopt laws of general application to provide that the streets shall be used for the purpose for which they primarily exist, and because the preservation of peace and order is one of the first duties of government. But in a series of cases we have held that local laws ostensibly passed pursuant to this admittedly possessed general power could not be enforced in such a way as to amount to a prior censorship on freedom of expression, or to abridge that freedom as to those rightfully and lawfully on the streets. Illinois, like all the other states of the Union, is part of a national democratic system the continued existence of which depends upon the right of free discussion of public affairs—a right whose denial to some leads in the direction of its eventual denial to all. I am of opinion that the court's injunction strikes directly at the heart of our government, and that deprivation of these essential liberties cannot be reconciled with the rights guaranteed to the people of this Nation by their Constitution.

MR. JUSTICE DOUGLAS concurs in this opinion.

[MR. JUSTICE REED wrote a dissenting opinion which concluded:] The principle contended for by petitioners is the right to tell their side of the story by peaceful picketing despite a state court's view that such picketing may project fear from past violence into the future. In the last analysis we must ask ourselves whether this protection against assumed fear of future coercion flowing from past violence is sufficient to justify the suspension of the constitutional guarantee of free speech. If picketing is prohibited here, the right maintained by *Thornhill v. Alabama* collapses on the first attack.

This nation relies upon public discussion as one of the indispensable means to

of violence in 1932, among them the bombing of Meadowmoor's plant referred to in the opinion. Petitioners offered evidence to show that at that time respondent was gangster-dominated, and that the gangsters in question had sought to obtain control of the union, but this evidence was excluded.

The opinion also refers to the beating of workers at a cut-rate dairy other than Meadowmoor. The master did not mention this incident in his findings, but it is referred to in the evidence, and from that source it appears that those beaten and told "to join the union" were inside workers not eligible for membership in the petitioning union.

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attain correct solutions of problems of social welfare. Curtailment of free speech limits this open discussion. Our whole history teaches that adjustment of social relations through reason is possible while free speech is maintained. This Court has the solemn duty of determining when acts of legislation or decrees of courts infringe that right guaranteed to all citizens. Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be of the kind that justify the suspension of the writ of habeas corpus or the suppression

of the right of trial by jury. Nothing approaching this situation exists in this record and, in my judgment, the action of the Supreme Court of Illinois in prohibiting peaceful picketing violates the constitutional rights of these petitioners.¹⁰

¹⁰ Since the reasons of the Illinois supreme court for issuing the injunction were primarily boycott reasons, its opinion is reported not here but in Chapter 3.

The dissent in *A. F. L. v. Swing*, also reported in Chapter 3, is based on the majority opinion in this *Meadowmoor* case.

Freedom of communication is the dominant problem also in Chapters 2 and 3.—C R

CHAPTER TWO

UNIONISTS' RIGHT OF FREE SPEECH ¹

In the episodes printed in the previous chapter the free-speech question was just as important as it is in this chapter and the next, but it was mingled with other problems and hidden from view. In some cases union violence was suppressed and free speech for unionists was suppressed incidentally. In some cases allegations of union violence were a screen for the stopping of free communica-

tion, without which the union could not operate. Complaints against excessive policing were partly that suspect unionists did not get due process of law, partly that they were not allowed to talk. Of injunctions, some forbid communication as part of a ban on severe violence, others forbid ordinary picketing which one man views as peaceful, another as intimidating.

¹The word "right" is used here in the very general sense of some sort of legal claim which, if recognized, will help the claimant—in this case help the unionist to achieve free speech. Strictly speaking, what he wants is liberty of speech, and if, as is seen in this chapter, his liberty is limited by legislation, he tries to get his liberty back by claiming constitutional immunity against the legislation. A legal "right" in the narrow sense he claims in other situations, for instance, if he asks damages from a policeman who has attacked him without justification, or complains to the local office of the National Labor Relations Board that he has been fired for union activity. If he can make good either of these claims, he will of course be free of some hindrances to his free speech, namely of some "private" hindrances—ones not originating with a legislature or a court.—C.R.

The present chapter deals with situations in which sweeping inhibitions have been laid on fundamental peaceful activities of unions. It begins with an account of a special sort of injunction—the yellow-dog injunction—which, at one point in our history, was used to forbid unionization, however peaceful. Today we might well consider such injunctions unconstitutional, under the free-speech clause. Evidence that they would be considered unconstitutional¹ is seen in the courts' present tendency to invoke that clause against various laws which limit freedom to assemble, to pass out leaflets, or to picket. The rest of the chapter is given over to court decisions on such laws, both city and state.

I. UNIONIZING CAMPAIGNS AND "YELLOW-DOG CONTRACTS"

Anti-union companies in the United States began in the 1870's to underscore their warnings to their workers that they would fire anyone who joined the union—underscore them by requiring a written or oral promise that the employee would not join a union. Several states passed laws penalizing firms which discharged for union activity or exacted these "yellow-dog contracts." But such laws were hard to enforce and, when the attempt was made to enforce them, they were declared unconstitutional (as we shall see in Chapter 4, in which these laws are

seen to be precursors of the National Labor Relations Act). The anti-union agreements remained, then, a dramatic reminder of the employer's liberty to discharge for union activity or membership.

Already at the turn of the century the Pennsylvania supreme court had held¹ that unionists should be forbidden to "induce" or "entice" employees to "breach" what were now sometimes called "iron-clad contracts."

¹ *Flaccus v. Smith*, 199 Pa. 128, 48 Atl. 894. (1901).—C.R.

That is, the union organizer was not to get the employees to join the union secretly; perhaps not even to talk to the employees about joining.

This injunction practice was endorsed by

the United States Supreme Court in 1917 in the *Hitchman* case in an opinion which breathed a cloud of doubt over unions, union aims, and union methods, which the Court pictured as necessarily violent.

HITCHMAN COAL & COKE COMPANY *v.* MITCHELL

Supreme Court of the United States. 1917.
245 U. S. 229; 38 Sup. Ct. 65; 62 L. Ed. 260.

MR. JUSTICE PITNEY delivered the opinion of the Court.

This was a suit in equity, commenced October 24, 1907, in the United States Circuit (afterwards District) Court for the Northern District of West Virginia, by the Hitchman Coal & Coke Company, a corporation organized under the laws of the state of West Virginia, against certain citizens of the state of Ohio, sued individually and also as officers of the United Mine Workers of America. . . .

Plaintiff owns about 5,000 acres of coal lands situate at or near Benwood, in Marshall county, West Virginia, and within what is known as the "Pan Handle District" of that state, and operates a coal mine thereon, employing between 200 and 300 men, and having an annual output, in and before 1907, of about 300,000 tons. At the time of the filing of the bill, and for a considerable time before and ever since, it operated its mine "non-union," under an agreement with its men to the effect that the mine should be run on a non-union basis, that the employees should not become connected with the union while employed by plaintiff, and that if they joined it their employment with plaintiff should cease. The bill set forth these facts, *inter alia*, alleged that they were known to defendants and each of them, and "that the said defendants have unlawfully and maliciously agreed together, confederated, combined and formed themselves into a conspiracy, the purpose of which they are proceeding to carry out and are now about to finally ac-

complish, namely: to cause your orator's mine to be shut down, its plant to remain idle, its contracts to be broken and unfulfilled, until such time as your orator shall submit to the demand of the union that it shall unionize its plant, and having submitted to such demand unionize its plant by employing only union men who shall become subject to the orders of the union," etc. The general object of the bill was to obtain an injunction to restrain defendants from interfering with the relations existing between plaintiff and its employees in order to compel plaintiff to "unionize" the mine. . . .

That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing non-membership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to "run union" were a sufficient explanation of its resolve to run "non-union," if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of "collective bargaining," it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties

are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. . . .¹

Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was "at will," and terminable by either party at any time, is of no consequence. . . .

In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that, by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations. . . .

We turn to the matters set up by way of justification or excuse for defendants' interference with the situation existing at plaintiff's mine.

The case involves no question of the rights of employees. Defendants have no

agency for plaintiff's employees, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employees might have. The right of the latter to strike would not give to defendants the right to instigate a strike. The difference is fundamental.

It is suggested as a ground of criticism that plaintiff endeavored to secure a closed non-union mine through individual agreements with its employees, as if this furnished some sort of excuse for the employment of coercive measures to secure a closed union shop through a collective agreement with the union. It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ. But it may be worth while to say, in addition: First, that there was no middle ground open to plaintiffs; no option to have an "open shop" employing union men and non-union men indifferently; it was the union that insisted upon closed-shop agreements, requiring even carpenters employed about a mine to be members of the union, and making the employment of any non-union man a ground for a strike; and secondly, plaintiff was in the reasonable exercise of its rights in excluding all union men from its employ, having learned, from a previous experience, that unless this were done union organizers might gain access to its mine in the guise of laborers.

Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the union here in question. . . . The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any

¹The Court cites as its precedent or authority *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 (1915). This case is similar to *Adair v. U. S.*, reported in Chapter 4. The use of these precedents is discussed at the end of this section.—C.R.

circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. . . .

Now, assuming defendants were exercising, through Hughes, the right to invite men to join their union, still they had plain notice that plaintiff's mine was run "non-union," that none of the men had a right to remain at work there after joining the union, and that the observance of this agreement was of great importance and value both to plaintiff and to its men, who had voluntarily made the agreement and desired to continue working under it. Yet defendants, far from exercising any care to refrain from unnecessarily injuring plaintiff, deliberately and advisedly selected that method of enlarging their membership which would inflict the greatest injury upon plaintiff and its loyal employees. Every Hitchman miner who joined Hughes' "secret order" and permitted his name to be entered upon Hughes' list was guilty of a breach of his contract of employment and acted a lie whenever thereafter he entered plaintiff's mine to work. Hughes not only connived at this, but must be deemed to have caused and procured it, for it was the main feature of defendants' plan, the *sine qua non* of their programme. Evidently it was deemed to be necessary, in order to "organize the Panhandle by a strike movement," that at the Hitchman, for example, man after man should be persuaded to join the union, and having done so to remain at work, keeping the employer in ignorance of their number and identity, until so many had joined that by stopping work in a body they could coerce the employer and the remaining miners to "organize the mine," that is, to make an agreement that none but members of the union should be employed, that terms of employment should be determined by negotiation not with the employees but with union officers—

perhaps residents of other states and employees of competing mines—and that all questions in controversy between the mine operator and the miners should likewise be settled with outsiders.

True, it is suggested that under the existing contract an employee was not called upon to leave plaintiff's employ until he actually joined the union and that the evidence shows only an attempt by Hughes to induce the men to *agree* to join, but no attempt to induce them to violate their contract by failing to withdraw from plaintiff's employment after *actually joining*. But in a court of equity, which looks to the substance and essence of things and disregards matters of form and technical nicety, it is sufficient to say that to induce men to *agree* to join is but a mode of inducing them to join, and that when defendants "had sixty men who had signed up or agreed to join the organization at Hitchman," and were "going to shut the mine down as soon as they got a few more men," the sixty were for practical purposes, and therefore in the sight of equity, already members of the union, and it needed no formal ritual or taking of an oath to constitute them such; their uniting with the union in the plan to subvert the system of employment at the Hitchman mine, to which they had voluntarily agreed and upon which their employer and their fellow employees were relying, was sufficient.

But the facts render it plain that what the defendants were endeavoring to do at the Hitchman mine and neighboring mines cannot be treated as a bona fide effort to enlarge the membership of the union. There is no evidence to show, nor can it be inferred, that defendants intended or desired to have the men at these mines join the union, unless they could organize the mines. Without this, the new members would be added to the number of men competing for jobs in the organized districts, while non-union men would take their places in the Pan-

handle mines. Except as a means to the end of compelling the owners of these mines to change their method of operation, the defendants were not seeking to enlarge the union membership.

In any aspect of the matter, it cannot be said that defendants were pursuing their object by *lawful* means. The question of their intentions—of their bona fides—cannot be ignored. . . . Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done. And we cannot deem the proffered excuse to be a “*just cause or excuse*,” where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff’s rights, of which defendants have full notice.

Another fundamental error in defendants’ position consists in the assumption that all measures that may be resorted to are lawful if they are “peaceable”—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff’s legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff’s employees constitutes such a violation. . . .

The present is not a case of merely withholding from an employer an economic need—as a supply of labor—until he assents to be governed by union regulations. Defendants have no supply of labor of which plaintiff stands in need. By the statement of defendant [T. L.] Lewis himself, made in his formal report to the Indianapolis convention of 1907, out of more than 370,000 coal miners in the states of Pennsylvania, Maryland, Virginia, and West Virginia, less than 80,000 (about 22 per cent) were members of the

union. Considering the Panhandle separately, doubtless the proportion was even smaller, and the supply of non-union labor ample. There is no reason to doubt that if defendants had been actuated by a genuine desire to increase the membership of the union without unnecessary injury to the known rights of plaintiff, they would have permitted their proselytes to withdraw from plaintiff’s employ when and as they became affiliated with the union—as their contract of employment required them to do—and that in this event plaintiff would have been able to secure an adequate supply of non-union men to take their places. It was with knowledge of this, and because of it, that defendants, through Hughes as their agent, caused the new members to remain at work in plaintiff’s mine until a sufficient number of men should be persuaded to join so as to bring about a strike and render it difficult if not practically impossible for plaintiff to continue to exercise its undoubted legal and constitutional right to run its mine “non-union.”

It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine, another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The disordered condition of a mining town in time of strike is matter of common knowledge. It was this kind of intimidation, as well as that resulting from the large organized membership of the union, that defendants sought to exert upon plaintiff. . . .

Defendants’ acts cannot be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were, their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw

custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.

Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of employees to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the union.

There can be no question that plaintiff was threatened with danger of an immediate strike as a result of the activities of Hughes. The effect of his arguments and representations is not to be judged from the testimony of those witnesses who rejected his overtures. Naturally, it was not easy for plaintiff to find men who would testify that they had agreed with Hughes to break their contract with plaintiff. One such did testify. But the true measure of the extent of his operations and the probability of his carrying them to success are indicated by his declaration to Myers that he had about enough names at the Hitchman to "crack off," by the statement to McKinley that twenty-four men at the Glendale mine had joined the organization, and sixty at the Hitchman, and by the fact that they

actually succeeded in shutting down the Richland about the middle of October. The declaration made concerning the Glendale is corroborated by the evidence of what happened at that mine.

That the damage resulting from a strike would be irremediable at law is too plain for discussion.

Therefore, upon the undisputed facts of the case, and the indubitable inferences from them, plaintiff is entitled to relief by injunction. Having become convinced by three costly strikes, occurring within a period of as many years, of the futility of attempting to operate under a closed-shop agreement with the union, it established the mine on a non-union basis, with the unanimous approval of its employees—in fact, upon their suggestion—and under a mutual agreement, assented to by every employee, that plaintiff would continue to run its mine non-union and would not recognize the United Mine Workers of America; that if any man wanted to become a member of that union he was at liberty to do so, but he could not be a member and remain in plaintiff's employ. Under that agreement plaintiff ran its mine for a year and more, and, so far as appears, without the slightest disagreement between it and its men, and without any grievance on their part. Thereupon defendants, having full notice of the working agreement between plaintiff and its men, and acting without any agency for those men, but as representatives of an organization of mine workers in other states, and in order to subject plaintiff to such participation by the Union in the management of the mine as necessarily results from the making of a closed-shop agreement, sent their agent to the mine, who, with full notice of, and for the very purpose of subverting, the status arising from plaintiff's working agreement and subjecting the mine to the union control, proceeded, without physical violence, indeed, but by persuasion accompanied by threats of a

reduction of wages and deceptive statements as to the attitude of the mine management, to induce plaintiff's employees to join the union and at the same time to break their agreement with plaintiff by remaining in its employ after joining; and this for the purpose not of enlarging the membership of the union, but of coercing plaintiff, through a strike or the threat of one, into recognition of the union.

As against the answering defendants, plaintiff's right [is clear].

MR. JUSTICE BRANDEIS, dissenting. . . .

The Circuit Court of Appeals, reversing the decree of the District Court, held that the United Mine Workers of America was not an unlawful organization under the laws of West Virginia, that its validity under the Federal Anti-trust Act could not be considered in this proceeding; that so long as defendants "refrained from resorting to unlawful measures to effectuate" their purpose "they could not be said to be engaged in a conspiracy to unionize plaintiff's mine"; that "the evidence failed to show that any unlawful methods were resorted to by these defendants in this instance"; and specifically, that there was nothing in the individual contracts which barred defendants from inducing the employees to join the union. With these conclusions I agree substantially.

First: The alleged illegality of the United Mine Workers of America under the law of West Virginia.

The United Mine Workers of America does not appear to differ essentially in character and purpose from other international unions which, like it, are affiliated with the American Federation of Labor. Its membership is said to be larger than that of any other, and it may be more powerful. But the common law does not limit the size of unions or the degree to which individual workmen

may by union increase their bargaining power. . . .

Second: The alleged illegality of the United Mine Workers of America under the Federal Anti-trust Act.

. . . the question was not in issue in the case. It had not been raised in the bill or by answer. Evidence bearing upon the issue . . . should have been excluded.

Third: The alleged conspiracy against the West Virginia Mines.

It was doubtless the desire of the United Mine Workers to unionize every mine on the American continent and especially those in West Virginia. . . . That desire and the purpose to effect it were not unlawful. They were part of a reasonable effort to improve the condition of workingmen engaged in the industry by strengthening their bargaining power through unions, and extending the field of union power. No conspiracy to shut down or otherwise injure West Virginia was proved. . . .

Fourth: "Unionizing plaintiff's mine without plaintiff's consent."

The fundamental prohibition of the injunction is against acts done "for the purpose of unionizing plaintiff's mine without plaintiff's consent." Unionizing a shop does not mean inducing the employees to become members of the union. It means inducing the employer to enter into a collective agreement with the union governing the relations of the employer to the employees. Unionizing implies, therefore, at least *formal* consent of the employer. Both plaintiff and defendants insisted upon exercising the right to secure contracts for a closed shop. The plaintiff sought to secure the *closed non-union shop* through individual agreements with employees. The defendants sought to secure the *closed union shop* through a collective agreement with the union. Since collective bargaining is legal, the fact that the workingmen's agreement is made not by individuals

directly with the employer, but by the employees with the union and by it, on their behalf, with the employer, is of no significance in this connection. The end being *lawful*, defendant's efforts to unionize the mine can be illegal only if the methods or means pursued were unlawful; unless indeed there is some special significance in the expression "unionizing without plaintiff's consent."

It is urged that a union agreement curtails the liberty of the operator. Every agreement curtails the liberty of those who enter into it. The test of legality is not whether an agreement curtails liberty, but whether the parties have agreed upon something which the law prohibits or declares otherwise to be inconsistent with the public welfare. The operator by the union agreement binds himself: (1) To employ only members of the union; (2) to negotiate with union officers instead of with employees individually the scale of wages and the hours of work; (3) to treat with the duly constituted representatives of the union to settle disputes concerning the discharge of men and other controversies arising out of the employment. These are the chief features of a "unionizing" by which the employer's liberty is curtailed. Each of them is legal. To obtain any of them or all of them men may lawfully strive and even strike. And, if the union may legally strike to obtain each of the things for which the agreement provides, why may it not strike or use equivalent economic pressure to secure an agreement to provide them?

It is also urged that defendants are seeking to "coerce" plaintiff to "unionize" its mine. But coercion, in a legal sense, is not exerted when a union merely endeavors to induce employees to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense. The employer is free either to accept the agree-

ment or the disadvantage. Indeed, the plaintiff's whole case is rested upon agreements secured under similar pressure of economic necessity or disadvantage. If it is coercion to threaten to strike unless plaintiff consents to a closed union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed non-union shop. The employer may sign the union agreement for fear that *labor* may not be otherwise obtainable; the workman may sign the individual agreement, for fear that *employment* may not be otherwise obtainable. But such fear does not imply coercion in a legal sense.

In other words, an employer, in order to effectuate the closing of his shop to *union* labor, may exact an agreement to that effect from his employees. The agreement itself being a lawful one, the employer may withhold from the men an economic need—employment—until they assent to make it. Likewise an agreement closing a shop to *non-union* labor being lawful, the union may withhold from an employer an economic need—labor—until he assents to make it. In a legal sense an agreement entered into, under such circumstances, is voluntarily entered into; and as the agreement is in itself legal, no reason appears why the general rule that a legal end may be pursued by legal means should not be applied. Or, putting it in other words, there is nothing in the character of the agreement which should make *unlawful* means used to attain it which in other connections are recognized as *lawful*.

Fifth: There was no attempt to induce employees to violate their contracts.

The contract created an employment at will; and the employee was free to leave at any time. The contract did not bind the employee *not* to join the union; and he was free to join it at any time. The contract merely bound him to withdraw from plaintiff's employ if he joined the union. There is evidence of an at-

tempt to induce plaintiff's employees to agree to join the union; but none whatever of any attempt to induce them to violate their contract. Until an employee actually joined the union he was not, under the contract, called upon to leave plaintiff's employ. There consequently would be no breach of contract until the employee both joined the union and failed to withdraw from plaintiff's employ. There was no evidence that any employee was persuaded to do that, or that such a course was contemplated. What perhaps was intended was to secure agreements or assurances from individual employees that they would join the union when a large number of them should have consented to do so; with the purpose, when such time arrived, to have them join the union together and strike—unless plaintiff consented to unionize the mine. Such a course would have been clearly permissible under the contract.

Sixth: Merely persuading employees to leave plaintiff's employ, or others not to enter it, was not unlawful.

To induce third persons to leave an employment is actionable if done maliciously and without justifiable cause, although such persons are free to leave at their own will. . . . It is equally actionable so to induce others not to enter the service. The individual contracts of plaintiff with its employees added nothing to its right in this connection, since the employment was terminable at will.

As persuasion, considered merely as a means, is clearly legal, defendants were within their rights if, and only if, their interference with the relation of plaintiff to its employees was for justifiable cause. The purpose of interfering was confessedly in order to strengthen the union, in the belief that thereby the condition of workmen engaged in mining would be improved; the bargaining power of the individual workingman was to be strengthened by collective bargaining;

and collective bargaining was to be insured by obtaining the union agreement. It should not, at this day, be doubted that to induce workmen to leave or not to enter an employment in order to advance such a purpose is justifiable when the workmen are not bound by contract to remain in such employment.

Seventh: There was no "threat, violence or intimidation."

The decree enjoined "threats, violence, or intimidation." Such action would, of course, be unlawful though employed in a justifiable cause. But there is no evidence that any of the defendants have resorted to such means. The propaganda among plaintiff's employees was conducted almost entirely by one man, the defendant Hughes, a district No. 6 organizer. His actions were orderly and peaceable, consisting of informal talks with the men, and a few quietly conducted public meetings in which he argued the benefits of organization and pointed out to the men that, although the company was then paying them according to the union scale, there would be nothing to prevent a later reduction of wages unless the men united. He also urged upon the men that if they lost their present jobs, membership in the union was requisite to obtaining employment in the union mines of the neighboring states. But there is no suggestion that he exceeded the moderate bounds of peaceful persuasion, and indeed, if plaintiff's witnesses are to be believed, men with whom Hughes had talked, his argument made no impression on them, and they expressed to him their satisfaction with existing conditions at the mines.

When this suit was filed no right of the plaintiff had been infringed and there was no reasonable ground to believe that any of its rights would be interfered with; and, in my opinion, the Circuit Court of Appeals properly reversed the decree of the District Court, and directed that the bill be dismissed.

MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur in this dissent.

* * *

The *Hitchman* decision, December 10, 1917, seemed to mean that a company, through a simple vaccination process, could obtain legal immunity from collective bargaining. To be sure, the country was already at war and in 1918 the National War Labor Board was to bring into partial operation its rule that men were not to be fired for union membership (see Chapter 4). If this rule had continued to be the official one, one

effect of it would have been the corollary rule that companies should not be able to get judges to enjoin unionizing. But the War Labor Board was not continued, and the post-war anti-union campaign saw yellow-dog contracts multiply and often become very elaborate. Suits to enjoin unionizing followed, but, outside the coal fields, there were surprisingly few of them. The many "yellow-dog" suits begun in the West Virginia coal fields in 1920 were consolidated into the *Red Jacket* case, referred to below. A local case in 1922 is described next.

A "YELLOW-DOG" INJUNCTION AND SOME BACKFIRE ¹

The king's robing room, where the miners in England called the dukes of coal to book in 1919, had a sort of counterpart in the lofty court room of Common Pleas of Somerset County [Pennsylvania] on April 27 [1922]. The barons of Somerset, sitting in a row within the rail, and the miners crowding all available seats, heard the injunction argued before Judge Berkey.

The barons were urbane, well-dressed, some lean with glasses on their noses, some with paunches reposing on their thighs, mostly pleasant gentlemen of poised address. The miners stared at the high ceilings, their faces strained to comprehend the legal noises; their laughter was quick and free, however, as points were scored for them. The judge was curt. He kept us all there until 11 o'clock that night.

The Consolidation case is called first, as a test; the injunctions for Berwind-White, the Hillman Coal and Coke Co.,

the Quemahoning and a dozen others are of one stripe.

The operators' lawyer quickly divulges their case. "We intend to prove that this is a conspiracy. If outsiders get our miners to quit work *even by persuasion*, they are committing an illegal act. Especially when accompanied by meetings.

"What is the purpose of these defendants? To unionize the miners and injure our business. We have a legal right to conduct our business as we see fit, the right to run non-union mines.

"These acts of organization,—strike cards, meetings,—are unlawful acts."

The judge requests him to cite his authorities.

Counsel begins reading, "245 U. S. p. 229 *Hitchman vs. Mitchell*."² As he reads on into the notorious magna charta of the open-shop in America, the judge asks whose opinion that is.

"Justice Holmes—no, Pitney's, 1917. It proves that the union activities are illegal."

The judge tells him to read on; he wants full light on this case. At last counsel concludes and demands: "What standing have they in court when the Supreme Court of the United States says

¹ Heber Blankenhorn, *The Strike for Union: A Study of the Non-Union Question in Coal and the Problems of a Democratic Movement, Based on the Record of the Somerset Strike, 1922-23* (New York: The H. W. Wilson Company, for the Bureau of Industrial Research, 1924), pp. 35-36, 39-40. Used by permission. Cf. "Injunctions and Other Legal Warnings," in Chapter 1 another quotation from the same book.—C.R.

² Quoted just above.—C.R.

it is unlawful to go in and organize a non-union mine?"

He cites the Flaccus case³ in 1901; and another older still.

Mr. Kintner and Mr. Scott set forth the union's answer. That the Hitchman case, based on written contracts, does not apply to Somerset. That the purpose of the union is legal—to improve living and working conditions. . . .

And now the court. "Why do you operators go to the men's meetings? What business have your officials there? Would the operators tolerate a miner at their meetings?"

Some barons' glasses fall off their noses. Their counsel cries out that it is

³ *Flaccus v. Smith*, 199 Pa. 128, 48 Atl. 894 (1901). Despite statutes of 1869 and 1870 which permitted joining unions and barred criminal-conspiracy suits against unions, a union was forbidden to organize men who had agreed not to join.—C.R.

just these meetings that they consider unlawful. "Have they the right to come into a non-union county to organize?"

Judge Berkey holds: "They have the right to their meetings. Not on company property but in the vicinity. I haven't held they have the right to organize. That's a delicate question of law. I'll decide that later."

Consolidation's lawyer protests. "Have they the right to build a bonfire *near* my property, because it's not *on* it?"

Judge Berkey makes his orders clear. Operators and guards have no business at miners' meetings. The miners leave court with heads in air.

Leaving we pass the jail. Miners' faces at all the bars. The lawyer gets them out as fast as they're thrown in. When they get home they find their goods "set out." . . .

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REACTION AGAINST THE YELLOW-DOG INJUNCTION

In 1921 the Supreme Court took occasion in the *American Steel Foundries* case to limit its *Hitchman* ruling¹ to the circumstances of the *Hitchman* case; it stressed the fact that the organizer had secured the men's adherence to the union surreptitiously and deceitfully, in order to be able "suddenly to declare a strike."² Judicial opinion was divided on the yellow-dog injunction. In 1923 the supreme court of Ohio refused an injunction against union solicitation of men who had signed yellow-dog contracts; the situation differed from that in the *Hitchman* case in that there was a strike going on and the men were not asked to deceive the company.³ In a similar case the highest court of New York refused to give these contracts weight in 1927.⁴

At about the same time the New York court was called on to decide whether to for-

bid unionizing because a company had arranged a company-union contract. Since the company union was dominated by the company and was not a real rival union, we may look on this case as much like a yellow-dog case.⁵ After a strike in 1916, the Interborough Rapid Transit Company of New York City had sponsored a company union called the Brotherhood of Interborough Rapid Transit Employees. In 1920 Lavin and others formed a new union and led an unsuccessful strike. The new union then merged with the Amalgamated Association of Street and Electric Railway Employees (A. F. L.) and continued to unionize. The company sought an injunction which would prohibit Lavin and others from inducing its employees to leave its employ; it also asked for damages for the union's wrongful action up to date. The suit was based on its contract with the company union, which bound the employees not to join the Amalgamated Association. The

¹ Reported above.—C.R.

² 257 U. S. 184, 211 (1921).—C.R.

³ *La France Electrical Construction and Supply Co. v. International Brotherhood of Electrical Workers, Local No. 8, et al.*, 108 Ohio State 61, 140 N. E. 899 (1923).—C.R.

⁴ *Exchange Bakery and Restaurant, Inc. v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927).—C.R.

⁵ The legal problems that arise when there are two bona fide rival unions are considered in the next chapter. There is no clear line between these bona fide rivalries and the rivalries of company unions with outside unions.—C.R.

lower court granted an injunction, but the Court of Appeals of New York set it aside,⁶ holding that the alleged contract did not give the company any extra rights.

While the above case was still on its way up to the highest court of New York, the company set out to improve its legal position by changing its arrangement with its company union to make it resemble a time contract, to make it look as different as possible from the terminable-at-will contract of the ordinary employment relation. On this basis the company began a new suit for an injunction, naming the president of the American Federation of Labor as the first defendant.

The defense held that the contract was unenforceable because of fraud, deception, duress, and overreaching on the part of the company. It also filed an elaborate character-witness brief which quoted many economists and others to the effect that unions and collective bargaining were socially desirable.

The lower court's decision was that no injunction against unionizing should be issued. It said that superficially the agreement with the company union was a two-year contract with each of the employees, but that the company reserved so many rights of dis-

⁶ *Interborough Rapid Transit Company v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928). The court said that the lower court might forbid trespass and deceitful statements. It left open the question whether the union could ask the employees to join surreptitiously (cf. the *Hitchman* case, above).—C.R.

charge as to make employment with the company, after all, substantially an ordinary at-will employment.⁷

Meanwhile, in 1927, the federal Circuit Court had handed down its decision in the *Red Jacket* case, which we saw was begun in 1920. Though yellow-dog injunctions had been subjected to considerable judicial criticism, the *Red Jacket* opinion by Judge John J. Parker followed the Supreme Court's *Hitchman* decision of 1917.⁸ The Supreme Court refused to review the case. Three years later Parker was nominated for the Supreme Court, but the Senate, in defiance of precedent, refused to accept him, after debating his 1927 decision on yellow-dog contracts.

In 1929 Wisconsin passed a law that yellow-dog contracts were to have no legal effect in Wisconsin—no general injunction against unionizing could be issued based on such a contract. In 1930 the Massachusetts legislature considered a similar law. It asked the state's highest court whether such a law would be constitutional. The court gave the answer which is reported next.

⁷ *Interborough Rapid Transit Co. v. Green*, 131 Misc. 682, 227 N. Y. Supp. 258 (1928). The case was not appealed. The implication of both the *Interborough* cases (like that of the *Exchange* case) was that the New York courts would not forbid unionizing. The defense "character witness" brief was reprinted by the Workers' Education Bureau.—C.R.

⁸ *International Organization, United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.*, 18 Fed. (2d) 839 (1927).—C.R.

In re OPINION OF THE JUSTICES

Supreme Judicial Court of Massachusetts. 1930.
271 Mass. 598; 171 N. E. 234.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

... The proposed bill is adequately described in its title in substance as an act declaring provisions in contracts of employment whereby either party undertakes not to join, become or remain a member of a labor union, or of any organization of employers, or undertakes in such event to withdraw from the con-

tract of employment, to be against public policy and void.

A contract similar to those described in the proposed bill was assailed and its validity was under consideration in *Hitchman Coal & Coke Co. v. Mitchell*. 245 U. S. 229 [reported above]. It there was said at pages 250, 251: "That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing non-membership in

the United Mine Workers of America is not open to question. . . . This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power." It is not necessary to consider whether the extent of the "paramount police power" in this connection can extend beyond provisions to secure that such contracts be free from coercion because it is plain that the proposed bill does not avoid insuperable difficulties now to be mentioned.

In *Adair v. United States*, 208, U. S. 161 [reported in Chapter 4], an act of Congress was attacked whereby a penalty was imposed upon an employer of labor for making a contract of the same general nature as those described in the proposed bill or for discharging an employe because of membership in a labor union, the acts thus denounced being declared misdemeanors. It was held in an exhaustive opinion that the act was violative of the provisions of the Fifth Amendment to the Federal Constitution forbidding Congress to enact any law depriving a person of liberty or property without due process of law. . . . In *Coppage v. Kansas*, 236 U. S. 1, the main point for consideration was the validity of a statute of Kansas declaring it a misdemeanor for an employer to make a contract indistinguishable in its essential features from those described in the proposed bill. It was held after elaborate discussion and review of decided cases that the statute was repugnant to the guaranties contained in the Fourteenth Amendment to the Constitution of the United States. . . . Those decisions, of course, are binding upon the several States as to the force and effect of the

Federal Constitution touching a statute like that in the proposed bill.

The principles thus declared by the Supreme Court of the United States prevail in this Commonwealth. The provisions of arts. 1, 10 and 12 of the Declaration of Rights of the Constitution of this Commonwealth are as strong in protection of individual rights and freedom as those of the Fifth and Fourteenth Amendments to the Constitution of the United States. It was said in *Commonwealth v. Perry*, 155 Mass. 117, 121: "The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law." . . . The *Adair* and *Coppage* cases have been . . . followed in *Opinion of the Justices*, 220 Mass. 627, 630, *Bogni v. Perotti*, 224 Mass. 152, 155, and *Opinion of the Justices*, 267 Mass. 607, 611. The views expressed in these several opinions and decisions, which need not be further amplified, are decisive of the question here propounded. There is a wide field for the valid regulation of freedom of contract in the exercise of the police power in the interests of the public health, the public safety or the public morals and in a certain restricted sense of the public welfare. A somewhat extended collection of references to such statutes and a review of relevant decisions were made in *Holcombe v. Creaner*, 231 Mass. 99, 104-107. None of them go so far as to justify a statute like that . . . proposed. . . .

Guided by the decisions of binding authority already cited, we respectfully answer that in our opinion the provisions of the proposed bill, if enacted into law, would be in conflict with the Constitution of the United States and of this Commonwealth.

* * * *

Basically, the justices argued correctly: the *Adair*, *Coppage*, and *Hitchman* cases all show hostility to unions, and this spirit is expressed in this *Opinion of the Justices*. But

the justices did not consider the possibility of any gradation of hostility.¹ A small amount of hostility might lead a judge to say, as in the *Adair* and *Coppage* cases, that the legislature should not be allowed to penalize employers for getting rid of union men. It would call for a larger amount of hostility for the judge to say that he would help the employer by granting an injunction against organizers. It would call for a still larger amount for him to say that he would override the decision of the legislature that he ought not to issue such injunctions.

The justices, as it turned out, were out of date. At the time they wrote, Chief Justice Hughes of the Supreme Court was revoking

¹ The U. S. Supreme Court failed similarly in the *Hutchman* case, for we saw above that it apparently accepted the *Coppage* case as directly relevant. Fundamental criticism of the Court's logic in the *Hutchman* case was voiced by W. W. Cook, "Privileges of Labor Unions in the Struggle for Life," *Yale Law Journal*, 27:779-801, April, 1918.—C.R.

the *Adair* decision in the *Texas and New Orleans* case, which is taken up in Chapter 4 and is a precursor of the 1934 Railway Labor Act and the National Labor Relations Act. In 1932 Congress passed the Norris-LaGuardia Act (printed in Chapter 1), of which Sections 3 and 4 made yellow-dog contracts of no effect in the federal courts. In 1933 the Massachusetts legislature passed a similar law. Other states followed, copying either the federal model or the special law against yellow-dog injunctions which Wisconsin had passed in 1929.²

² In 1931-40 such laws were passed in Arizona, California, Colorado, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, New Jersey (corporations only), New York, Ohio, and Oregon. Laws vaguely endorsing collective bargaining, which might be interpreted to the same effect, were passed by Kentucky, Nevada, Pennsylvania, Utah, and Wyoming. The anti-discrimination laws treated in Chapter 5 also imply a ban on yellow-dog injunctions.—C.R.

II. CRIMINAL SYNDICALISM LAWS

Accusations of radicalism have always been a very strong weapon of employers against union leaders. If made strongly enough, these accusations help turn people against unions and help get union leaders convicted of various charges, such as disorderly conduct, unrelated to radicalism. If a unionist is an alien and is charged with radicalism, he may be deported. Whether he is an alien or a citizen, in some states he may be tried for criminal syndicalism, which, like other "treason" charges, carries heavy penalties. Sometimes sweeping arrests of rank-and-file strikers are made, too. Most of the criminal syndicalism laws originated during the 1917-19 war and postwar period and were aimed at the I. W. W., whose leaders avowed a syndicalist philosophy. The Supreme Court upheld these laws in 1927, when it refused to upset a California conviction based on participation in the organization of the Communist party, though at the convention the defendant had voted against the plank which stated that a violent overturn was necessary.¹

In 1935 there were criminal syndicalism laws in effect in twenty states and two territories: Alaska, California, Colorado, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, West Virginia, and Wyoming.²

² E. Foster Dowell, "Criminal Syndicalism Legislation 1935-1939," *Public Opinion Quarterly*, 4:300, June, 1940. Dowell states (p. 303): "... patriotic and employers' organizations and conservatives in general, newly reinforced by the Elks and Knights of Columbus, supported such laws; labor, liberal, progressive and radical organizations opposed them. The 'average' middle-class legislator, especially from the rural districts, knew little about such legislation, distrusted any movement labeled radical or in which Communists participated and, in any case, could not afford to incur the enmity of the politically strong 'patriots' and economically powerful employers. . . . The forces desiring to retain these laws are powerfully entrenched and await only a wave of reaction (which often occurs most markedly in a war or postwar period) to enforce the criminal syndicalism laws where they exist or to place them on the statute books of additional states or even the federal government." See also E. F. Dowell, *A History of Criminal Syndicalism Legislation in the United States* (Baltimore: The Johns Hopkins Press, 1939).—C.R.

¹ *Whitney v. California*, 274 U. S. 357 (1927).—C.R.

DE JONGE *v.* OREGON

Supreme Court of the United States. 1937.
299 U. S. 353; 57 Sup. Ct. 255; 81 L. Ed. 278.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Appellant, Dirk De Jonge, was indicted in Multnomah County, Oregon, for violation of the Criminal Syndicalism Law of that State.³ . . .

. . . Appellant was found guilty as charged and was sentenced to imprisonment for seven years. . . .

The record does not present the evidence adduced at the trial. The parties have substituted a stipulation of facts . . . : That on July 27, 1934, there was held in Portland, a meeting which had been advertised by handbills issued by the Portland section of the Communist Party; that the number of persons

in attendance was variously estimated at from 150 to 300; that some of those present, who were members of the Communist Party, estimated that not to exceed ten to fifteen per cent of those in attendance were such members; that the meeting was open to the public without charge and no questions were asked of those entering, with respect to their relation to the Communist Party; that the notice of the meeting advertised it as a protest against illegal raids on workers' halls and homes and against the shooting of striking longshoremen by Portland police; that the chairman stated that it was a meeting held by the Communist Party; that the first speaker dwelt on the activities of the Young Communist League; that the defendant De Jonge, the second speaker, was a member of the Communist Party and went to the meeting to speak in its name; that in his talk he protested against conditions in the county jail, the action of city police in relation to the maritime strike then in progress in Portland and numerous other matters; that he discussed the reason for the raids on the Communist headquarters and workers' halls and offices; that he told the workers "that these attacks were due to efforts on the part of the steamship companies and stevedoring companies to break the maritime longshoremen's and seamen's strike; that they hoped to break the strike by pitting the longshoremen and seamen against the Communist movement; that there was also testimony to the effect that defendant asked those present to do more work in obtaining members for the Communist Party and requested all to be at the meeting of the party to be held in Portland on the following evening and to bring their friends to show their de-

³ Oregon Code, 1930, sections 14-3110-3112—as amended by chapter 459, Oregon Laws, 1933:

"Section 14-3110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

"Section 14-3111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

"Section 14-3112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster, document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine of criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than \$1,000, or by both such imprisonment and fine."

fiance to local police authority and to assist them in their revolutionary tactics; that there was also testimony that defendant urged the purchase of certain communist literature which was sold at the meeting; that while the meeting was still in progress it was raided by the police; that the meeting was conducted in an orderly manner; that defendant and several others who were actively conducting the meeting were arrested by the police and that on searching the hall the police found a quantity of communist literature.

The stipulation then set forth various extracts from the literature of the Communist Party to show its advocacy of criminal syndicalism. The stipulation does not disclose any activity by the defendant as a basis for his prosecution other than his participation in the meeting in question. Nor does the stipulation show that the communist literature distributed at the meeting contained any advocacy of criminal syndicalism or of any unlawful conduct. It was admitted by the Attorney General of the State in his argument at the bar of this Court that the literature distributed in the meeting was not of that sort and that the extracts contained in the stipulation were taken from communist literature found elsewhere. Its introduction in evidence was for the purpose of showing that the Communist Party as such did advocate the doctrine of criminal syndicalism, a fact which is not disputed on this appeal. . . .

. . . The words of the indictment that "said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage," referred not to the meeting in question, or to anything then and there said or done by defendant or others, but to the advocacy of criminal syndicalism and sabotage by the Communist Party in Multnomah County. The ruling of the state court

upon this point was precise. The court said (152 Ore. p. 330):

"Turning now to the grounds for a directed verdict set forth in defendant's motion therefor, we note that he asserts and argues that the indictment charges the assemblage at which he spoke with unlawfully and feloniously teaching and advocating the doctrine of criminal syndicalism and sabotage, and elsewhere in the same motion he contends that the indictment charges the defendant with unlawfully and feloniously teaching and advocating said doctrine at said meeting. The indictment does not, however, charge the defendant, nor the assemblage at which he spoke, with teaching or advocating at said meeting at 68 Southwest Alder street, in the city of Portland, the doctrine of criminal syndicalism or sabotage. What the indictment does charge, in plain and concise language, is that the defendant presided at, conducted and assisted in conducting an assemblage of persons, organization, society and group, to-wit, the Communist party, which said assemblage of persons, organization, society and group was unlawfully teaching and advocating in Multnomah county the doctrine of criminal syndicalism and sabotage."

In this view, lack of sufficient evidence as to illegal advocacy or action at the meeting became immaterial. Having limited the charge to defendant's participation in a meeting called by the Communist Party, the state court sustained the conviction upon that basis regardless of what was said or done at the meeting. . . .

. . . Thus if the Communist Party had called a public meeting in Portland to discuss the tariff, or the foreign policy of the Government, or taxation, or relief, or candidacies for the offices of President, members of Congress, Governor, or state legislators, every speaker who assisted in the conduct of the meeting would be equally guilty with the defendant in this case, upon the charge as here defined and sustained. . . .

While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political

action in order to effect revolutionary changes in government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application. In *Gitlow v. New York*, 268 U. S. 652, under the New York statute defining criminal anarchy, the defendant was found to be responsible for a "manifesto" advocating the overthrow of the government by violence and unlawful means. *Id.*, pp. 656, 662, 663. In *Whitney v. California*, 274 U. S. 357, under the California statute relating to criminal syndicalism, the defendant was found guilty of wilfully and deliberately assisting in the forming of an organization for the purpose of carrying on a revolutionary class struggle by criminal methods. The defendant was convicted of participation in what amounted to a conspiracy to commit serious crimes. *Id.*, pp. 363, 364, 367, 379. The case of *Burns v. United States*, 274 U. S. 328, involved a similar ruling under the California statute as extended to the Yosemite National Park. *Id.*, pp. 330, 331. On the other hand, in *Fiske v. Kansas*, 274 U. S. 380, the criminal syndicalism act of that State was held to have been applied unconstitutionally and the judgment of conviction was reversed, where it was not shown that unlawful methods had been advocated. *Id.*, p. 387. See, also, *Stromberg v. California*, 283 U. S. 359.

Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. . . .

These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must

not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. . . . If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. . . .

We hold that the Oregon statute as applied to the particular charge as defined by the state court is repugnant to the due process clause of the Fourteenth Amendment. The judgment of conviction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

• • • •

Oregon repealed its law after this decision; so did Washington. Other laws remained dormant, but were brought out again when labor activity increased. The California law, which had been used chiefly against migratory agricultural labor in the I. W. W. period,⁴ was invoked against the same class in the thirties, with the 1935 Sacramento trial of leaders of the Agricultural and Cannery Workers as a climax. Excitement and prejudice were aroused by the press against the

⁴ Under the California law, between 1919 and 1924, 504 persons were arrested, 264 tried, and 164 convicted. George W. Kirchwey, *Survey of the Workings of the Criminal Syndicalism Law of California*, quoted in Herbert Solow, *Union-Smashing in Sacramento* (New York: National Sacramento Appeal Committee, 1935), p. 14.—C.R.

Communist union leader. The jurors, who returned to their homes daily during the sixteen weeks of the trial, were not unaffected. The verdict was a compromise. Some defendants were acquitted (one was then deported); the others were acquitted on most counts but were found guilty of forming political and economic organizations (that is, of "conspiring") to advocate violence. In the fall of 1937 a higher state court released them. It upheld the statute, but said that the jury, in compromising, had contradicted itself; it had acquitted them of acts which it then convicted them of *conspiring* to do.⁵

⁵ *People v. Chambers*, 22 Cal. App. (2d) 687 (1937). See also Stein and others, *Labor Problems in America*, pp. 571-2.—C.R.

III. LAWS LIMITING ASSEMBLY AND LEAFLET-DISTRIBUTION

Free speech for unionists has been limited by laws—usually city ordinances—which hinder free assembly or hinder free distribution of leaflets. These are sometimes explained on the basis that traffic must not be congested or the streets littered or people annoyed. Sometimes it is said that street meetings are likely to lead to fights. Similar explanations are given for the anti-picketing ordinances taken up in the next section.

Much depends on how these ordinances

are enforced by the police or by the licensing officer, if it is a matter of licensing. If cases go to court, there is considerable latitude of interpretation by judges—unless indeed the view is to prevail that all these ordinances are unconstitutional because they limit free speech. The local criminal courts have usually held them constitutional, but the Supreme Court of the United States has recently led the higher courts in its emphasis on liberty of communication.

HAGUE v. C. I. O.

Supreme Court of the United States. 1939.
307 U. S. 496; 59 Sup. Ct. 954; 83 L. Ed. 1423.

Jersey City, New Jersey, under the mayoralty of Frank Hague has been known for many years as an anti-union town. The police were in the habit of "deporting" union organizers without making legal charges against them. In addition, unionists were subject to arrest under ordinances against leaflet distribution, open-air meetings, and the display of placards by pickets. In addition, New Jersey has statutes penalizing disorderly persons, disorderly conduct, and unlawful assembly.

In 1937 the C. I. O. went to the federal

court to get an injunction against the police deportations and against the enforcement of the ordinances.¹ The court granted one, but it was suspended, pending appeal. About this time the Supreme Court invalidated an anti-leaflet ordinance in *Lovell v. Griffin*, 303 U.S. 444 (1938). The C. I. O. then began a second injunction suit against Jersey City.

The court issued an injunction, but, in

¹ Some of the evidence about Jersey City practices given in this first injunction case was reprinted in *Civil Rights vs. Mayor Hague* (New York: American Civil Liberties Union, 1938, pamphlet).—C.R.

connection with the unionists' liberty to give out leaflets in public places and to carry placards, the court made the reservation (which had been made by the Supreme Court in *Lovell v. Griffin*) that they were not to be obscene or advocate unlawful conduct and that the unionists must behave in a manner "consistent with the maintenance of public order and not involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."

In connection with the unionists' freedom of assembly, the court said that the town was to issue permits to unions for public assemblies (unless and until the town passed an ordinance forbidding all open-air meetings, even to the Salvation Army), but it made the reservation that the permits need not be given if the meetings would interfere unduly with the public's use of the parks for recreation and with the use of the streets for traffic.

When the case went to the Circuit Court, the presiding judge began to assemble a special group of judges to hear the case, but after protests from the C. I. O. he was persuaded not to do so. When the court's decision was handed down, it limited Jersey City even more than the original injunction had. The court rejected the town's arguments that the C. I. O. came into court with unclean hands and that the injunction would require that the court supervise the town government continuously. It stated that the assembly ordinance had been "administered in a discriminatory and therefore unconstitutional manner" and that it would not be constitutional for the town to pass a law which forbade open-air meetings to unions and Salvation Army alike.²

In the Supreme Court, the majority of the judges upheld the injunction and even stiffened it further. The majority was, however, split on the question what phrase in the Fourteenth Amendment was the one to use against Jersey City, "privileges and immunities of citizens of the United States" (thus excluding aliens and organizations as non-citizens) or "due process of law."³ Both groups which upheld the injunction rested

their decision, as the lower courts had done, on the fact that Congress, after the Civil War, had passed Civil Rights Acts which undertook to protect individuals from undue interference by states and municipalities.

* * * *

[MR. JUSTICE BUTLER:] . . . the decree is modified and as modified affirmed. MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of the case. MR. JUSTICE ROBERTS has an opinion, and MR. JUSTICE STONE an opinion. THE CHIEF JUSTICE concurs in an opinion. MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER dissent for reasons stated in opinions by them respectively.

MR. JUSTICE ROBERTS delivered an opinion in which MR. JUSTICE BLACK concurred.

. . . privileges and immunities of the individual respondents as citizens of the United States, were infringed by the petitioners, by virtue of their official positions, under color of ordinances of Jersey City, unless, as petitioners contend, the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof, or unless, though the city holds the streets in trust for public use, the absolute denial of their use to the respondents is a valid exercise of the police power.

The findings of fact negative the latter assumption. In support of the former the petitioners rely upon *Davis v. Massachusetts*, 167 U. S. 43. There it appeared that, pursuant to enabling legislation, the city of Boston adopted an ordinance prohibiting anyone from speaking, discharging fire arms, selling goods, or maintaining any booth for public amusement on any of the public grounds of the city ex-

New York, 268 U. S. 652 (1925). Not long after the Hague decision, the Court decided the *Schneider* case, quoted below, and a little later the *Thornhill* case, quoted in the next section; in these cases the Court relied on the "due process" clause.—C.R.

² *Hague v. C. I. O.*, 101 Fed. (2d) 774 (1939).—C.R.

³ The latter phrase had been held to preserve free speech against state encroachment since *Gilow v.*

cept under a permit from the Mayor. Davis spoke on Boston Common without a permit and without applying to the Mayor for one. He was charged with a violation of the ordinance and moved to quash the complaint, *inter alia*, on the ground that the ordinance abridged his privileges and immunities as a citizen of the United States and denied him due process of law because it was arbitrary and unreasonable. His contentions were overruled and he was convicted. The judgment was affirmed by the Supreme Court of Massachusetts and by this court.

The decision seems to be grounded on the holding of the State court that the Common "was absolutely under the control of the legislature," and that it was thus "conclusively determined there was no right in the plaintiff in error to use the common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe." The Court added that the Fourteenth Amendment did not destroy the power of the states to enact police regulations as to a subject within their control or enable citizens to use public property in defiance of the constitution and laws of the State.

The ordinance there in question apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless might be regulated or prohibited as respects their enjoyment in parks. In the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks.

We have no occasion to determine whether, on the facts disclosed, the *Davis* case was rightly decided, but we cannot

agree that it rules the instant case. Whenever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent "riots, disturbances or disorderly assemblage." It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly "prevent" such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right. . . .

Paragraphs 2 and 3 enjoin interference with the distribution of circulars, handbills and placards. The decree attempts to formulate the conditions under which respondents and their sympathizers may distribute such literature free of interference. The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell v. Griffin*, 303

U. S. 444 and petitioners so concede. We think the decree goes too far. All respondents are entitled to a decree declaring the ordinance void and enjoining the petitioners from enforcing it.

Paragraph 4 has to do with public meetings. Although the court below held the ordinance void, the decree enjoins the petitioners as to the manner in which they shall administer it. There is an initial command that the petitioners shall not place "any previous restraint" upon the respondents in respect of holding meetings, provided they apply for a permit as required by the ordinance. This is followed by an enumeration of the conditions under which a permit may be granted or denied. We think this is wrong. As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners. They are free to hold meetings without a permit and without regard to the terms of the void ordinance. The courts cannot rewrite the ordinance, as the decree, in effect, does.

The bill should be dismissed as to [the C. I. O., which is an association and so not a citizen; in fact as to] all save the individual plaintiffs, and Section B, paragraphs 2, 3 and 4 of the decree should be modified as indicated. In other respects the decree should be affirmed.

MR. JUSTICE STONE.

I do not doubt that the decree below, modified as has been proposed, is rightly affirmed, but I am unable to follow the path by which some of my brethren have attained that end, and I think the matter is of sufficient importance to merit discussion in some detail.

It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by

the due process clause of the Fourteenth Amendment. [He reviewed at length the issue of "privileges and immunities" vs. "due process."]

MR. JUSTICE REED concurs in this opinion.

MR. CHIEF JUSTICE HUGHES, concurring:

With respect to the merits I agree with the opinion of MR. JUSTICE ROBERTS and in the affirmance of the judgment as modified. With respect to the point as to jurisdiction I agree with what is said in the opinion of MR. JUSTICE ROBERTS as to the right to discuss the National Labor Relations Act being a privilege of a citizen of the United States, but I am not satisfied that the record adequately supports the resting of jurisdiction upon that ground. As to that matter, I concur in the opinion of MR. JUSTICE STONE.

MR. JUSTICE McREYNOLDS, dissenting.

I am of opinion that the decree of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court with instructions to dismiss the bill. In the circumstances disclosed, I conclude that the District Court should have refused to interfere by injunction with the essential rights of the municipality to control its own parks and streets. Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts, and essays in that direction should be avoided.

There was ample opportunity for respondents to assert their claims through an orderly proceeding in courts of the state empowered authoritatively to interpret her laws with final review here in respect of federal questions.⁴

MR. JUSTICE BUTLER, dissenting.

I am of opinion that the challenged ordinance is not void on its face; that in

⁴ The New Jersey high court had recently refused to require Jersey City to issue a permit for Norman Thomas to speak. *Thomas v. Casey*, 121 N. J. L. 185 (1938).—C.R.

principle it does not differ from the Boston ordinance, as applied and upheld by this Court, speaking through Mr. Justice White, in *Davis v. Massachusetts*, 167 U. S. 43, affirming the Supreme Judicial

Court of Massachusetts, speaking through Mr. Justice Holmes, in *Commonwealth v. Davis*, 162 Mass. 510, and that the decree of the Circuit Court of Appeals should be reversed.

SCHNEIDER v. STATE (TOWN OF IRVINGTON)

Supreme Court of the United States. 1939.
308 U. S. 147; 60 Sup. Ct. 146; 84 L. Ed. 115.

After the *Lovell* case decided that leaflet distribution was protected by the Constitution, the question how far to extend freedom of speech and of the press in this connection was brought before the Supreme Court in these four cases: *Schneider v. State (Town of Irvington)* (Docket No. 11); *Kim Young v. California* (Docket No. 13); *Snyder v. Milwaukee* (Docket No. 18); *Nichols v. Massachusetts* (Docket No. 29).

* * * *

MR. JUSTICE ROBERTS delivered the opinion of the Court. . . .

No. 13.

The Municipal Code of the City of Los Angeles, 1936, provides:

"Sec. 28.00. 'Hand-Bill' shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

"Sec. 28.01. No person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to or upon any automobile or other vehicle."

The court below sustained the validity of the ordinance on the ground that experience shows littering of the streets results from the indiscriminate distribution of handbills.¹ It held that the right of

free expression is not absolute but subject to reasonable regulation and that the ordinance does not transgress the bounds of reasonableness. *Lovell v. City of Griffin*, 303 U. S. 444, was distinguished on the ground that the ordinance there in question prohibited distribution anywhere within the city while the one involved forbids distribution in a very limited number of places.

No. 18.

An ordinance of the City of Milwaukee, Wisconsin, provides:

"It is hereby made unlawful for any person . . . to circulate or distribute any circular, handbills, cards, posters, dodgers, or other printed or advertising matter . . . in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the City of Milwaukee." . . .

The petitioner, who was acting as a picket, stood in the street in front of a meat market and distributed to passing pedestrians handbills which pertained to a labor dispute with the meat market, set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it. Some of the bills were thrown in the street by the persons to whom they were given and it resulted that many of the papers lay in the gutter and in the street.

and said: "Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views. But if this be so, our conclusion is not thereby changed."

¹ On the hand-bill were the words "Admission 25¢ and 50¢." The Superior Court adverted to these

The police officers who arrested the petitioner and charged him with a violation of the ordinance did not arrest any of those who received the bills and threw them away. The testimony was that the action of the officers accorded with a policy of the police department in enforcement of the ordinance to the effect that, when such distribution resulted in littering of the streets, the one who was the cause of the littering, that is, he who passed out the bills, was arrested rather than those who received them and afterwards threw them away. The Milwaukee County court found the petitioner guilty and fined him. On appeal the judgment was affirmed by the Supreme Court. . . .

The court held that the purpose of the ordinance was to prevent an unsightly, untidy, and offensive condition of the sidewalks. It distinguished *Lovell v. City of Griffin, supra*, on the ground that the ordinance there considered manifestly was not aimed at prevention of littering of the streets. The court approved the administrative construction of the ordinance by the police officials and felt that this construction sustained its validity. The court said: "Unless and until delivery of the hand-bills was shown to result in a littering of the streets their distribution was not interfered with."

No. 29.

An ordinance of the City of Worcester, Massachusetts, provides:

"No person shall distribute in, or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. . . ."

The appellants distributed in a street leaflets announcing a protest meeting in connection with the administration of State unemployment insurance. They did not throw any of the leaflets on the sidewalk or scatter them. Some of those to whom the leaflets were handed threw them on the sidewalk and the street, with

the result that some thirty were lying about.

. . . Referring to the ordinance the court said: "It interferes in no way with the publication of anything in the city of Worcester, except only that it excludes the public streets and ways from the places available for free distribution. It leaves open for such distribution all other places in the city, public and private."

No. 11.

An ordinance of the Town of Irvington, New Jersey, provides: "No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matter, or call from house to house in the Town of Irvington without first having reported to and received a written permit from the Chief of Police or the officer in charge of Police Headquarters." . . . Persons delivering goods, merchandise, or other articles in the regular course of business to the premises of persons ordering, or entitled to receive the same, are exempted from the operation of the ordinance. Violation is punishable by fine or imprisonment.

The petitioner was . . . one of "Jehovah's Witnesses." In this capacity she called from house to house in the town at all hours of the day and night and showed to the occupants a so-called testimony and identification card signed by the society. The card stated that she would leave some booklets discussing problems affecting the person interviewed; and that, by contributing a small sum, that person would make possible the printing of more booklets which could be placed in the hands of others. . . .

The Supreme Court held that the petitioner's conduct amounted to the solicitation and acceptance of money contributions without a permit, and held the ordinance prohibiting such action a valid regulation, aimed at protecting occupants and others from disturbance and annoy-

ance and preventing unknown strangers from visiting houses by day and night. It overruled the petitioner's contention that the measure denies or unreasonably restricts freedom of speech or freedom of the press. The Court of Errors and Appeals thought *Lovell v. City of Griffin*, *supra*, not controlling, since the ordinance in that case prohibited all distribution of printed matter and was not limited to ways which might be regarded as consistent with the maintenance of public order or as involving disorderly conduct, molestation of inhabitants, or misuse or littering of the streets, whereas the ordinance here involved is aimed at canvassing or soliciting, subjects not embraced in that condemned in the *Lovell* case. The Court said: "A municipality may protect its citizens against fraudulent solicitation and, when it enacts an ordinance to do so, all persons are required to abide thereby. The ordinance in question was evidently designed for that purpose." . . .

The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state.²

Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets

are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. . . . The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such a diminution of the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and

² *Gilow v. New York*, 268 U. S. 652. . . . There is no averment or proof in any of the cases that the appellants or petitioners are citizens of the United States, and in the *Young* case, No. 13, the applicable provisions of the municipal code were challenged on the sole ground that they infringed the due process clause of the Fourteenth Amendment. . . .

to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

In *Lovell v. City of Griffin*, *supra*, this court held void an ordinance which forbade the distribution by hand or otherwise of literature of any kind without written permission from the city manager. The opinion pointed out that the ordinance was not limited to obscene and immoral literature or that which advocated unlawful conduct, placed no limit on the privilege of distribution in the interest of [order, was not aimed to prevent molestation of inhabitants or misuse] of streets, and was without limitation as to time or place of distribution. The court said that, whatever the motive, the ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censorship; and that the ordinance was void on its face, because it abridged the freedom of the press. Similarly in *Hague v. C. I. O.*, [reported above,] an ordinance was held void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places.

The Los Angeles, the Milwaukee, and the Worcester ordinances under review do not purport to license distribution but all of them absolutely prohibit it in the streets and, one of them, in other public places as well.

The motive of the legislation under attack in Numbers 13, 18 and 29 is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which

prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

It is argued that the circumstance that in the actual enforcement of the Milwaukee ordinance the distributor is arrested only if those who receive the literature throw it in the streets, renders it valid. But, even as thus construed, the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

While it affects others, the Irvington ordinance drawn in question in No. 11, as construed below, affects all those, who, like the petitioner, desire to impart information and opinion to citizens at their homes. If it covers the petitioner's activities it equally applies to one who wishes to present his views on political, social or economic questions. The ordinance is not

limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the "project" he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion.

As said in *Lovell v. City of Griffin*, *supra*, pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for

this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty. We do hold, however, that the ordinance in question, as applied to the petitioner's conduct, is void, and she cannot be punished for acting without a permit.

The judgment in each case is reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE McREYNOLDS is of opinion that the judgment in each case should be affirmed.

IV. LAWS AGAINST PEACEFUL PICKETING

There have been simple anti-picketing ordinances, and in some cases state statutes, in existence for many years. More recently fairly complicated regulations have been introduced, aimed partly at certain methods of picketing, and partly at certain types of strike or boycott, in connection with which all picketing would be forbidden. Thus the Los Angeles ordinance of 1938 (superseding one invalidated by a court) forbade picketing except by persons who had been employed by the company at least thirty days.

¹ See also Stein and others, *Labor Problems in America*, pp. 574-77.—C.R.

No more than one picket was to be at each entrance. No picket was to be nearer than 25 feet to another one, nor cry out or use "derogatory" language. Pickets could wear arm-bands and carry banners 20 by 30 inches, which could advertise the name of the union, the word "picket," and the fact that a strike existed, but nothing else. As to the second aim, the 30-day rule forbade picketing in a boycott not part of a strike, and no picketing at all was allowed in strikes not supported by a majority of the employees. These two provisions militated against unionizing.

THOMAS *v.* CITY OF INDIANAPOLIS

Supreme Court of Indiana. 1924.

195 Ind. 440; 145 N. E. 550.

An Indianapolis ordinance of 1919 forbade picketing, both coercive and peaceful. Thomas, arrested for picketing, appealed to the Indiana Supreme Court on the ground that the law was unconstitutional.

... "Picketing" . . . has been defined as the maintenance of an organized espionage upon the works or places of business of an employer and those going to and from them, and it has been remarked that the word "picket" is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude toward the individual or corporation against whom a labor organization has a grievance. . . .

Although . . . a majority of the courts have recognized the rights of striking employees to maintain pickets to beset the premises of the employer where no unlawful means were used and where there was no legislation upon the subject, yet many courts, whose opinions are entitled to great weight, have taken the position that all picketing, as that term is used in

modern practice, is unlawful and should be restrained. . . .

[These courts] assert generally that there can be no such thing as peaceful picketing and that no matter what the declared intention of the persons so engaged may be, the inevitable result is to create turmoil, disturbances and breaches of the peace. It is probable that the city council, which passed the ordinance in question, took the latter view and believed that all picketing was inimical to the peace and good order of the public, and that the public welfare would best be subserved by prohibiting all picketing in the manner described in the ordinance. . . .

... The rights which appellants have and assert in this case, such as the right to free speech, peaceable assemblage, and the right to use the public streets, as well as the other rights and privileges urged by appellants, are all subject to such reasonable regulation as the governing body of the government may make for the general good, and, as we deem the ordinance

in question to be reasonable and one within the power of the council to adopt, it does not infringe upon any of the constitutional rights of appellants. . . .

This ordinance does not prevent employes from striking nor does it prevent them from presenting their side of the controversy with their employer to others. . . .

[In connection with that part of the ordinance forbidding non-peaceful picketing, the court rejected the complainants' contention that the statute punished as criminal actions which were already considered criminal under other laws, in violation of constitutional principles forbidding double jeopardy.]

* * * *

There were many ordinances limiting picketing or leaflet distribution, and their number was increased by the increased activity of trade unions from 1933 on. But this period also saw a strong current of opposition to these laws. A state legislature might be passing an anti-injunction law designed to legalize peaceful persuasion and communication in labor disputes, while a

town within the state might be undoing this work by limiting communication. This sort of conflict between legislatures served to re-raise in the Indiana courts the issue which, as we have just seen, they had passed on in 1924. An anti-picketing ordinance was passed by the city of Kokomo in 1935 after a strike had led to long-drawn out picketing. The state legislature had meanwhile passed an anti-injunction law in 1933. The Supreme Court of Indiana held that the city's ordinance was void because it conflicted with the state's policy as expressed in the anti-injunction law. *Local Union No. 26, National Brotherhood of Operative Potters v. City of Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624 (1937). A similar ruling was made in *City of Yakima v. Gorham*, 94 Pac. (2d) 180 (Washington, 1939). We saw in Chapter 1, in the *Tiuax* case, that the Supreme Court rebuked a state court which let an anti-injunction law help it to the conclusion that peaceful picketing was not only non-enjoinable but was generally lawful. The *Hutcheson* case in Chapter 3 shows a later Supreme Court letting an anti-injunction law help it to a similar conclusion. See also the dissent and editorial note at the end of *People v. Harris*, just below.

PEOPLE *v.* HARRIS

Supreme Court of Colorado. 1939.
104 Col. 386; 91 Pac. (2d) 989.

MR. JUSTICE BOCK delivered the opinion of the court.

This case is before us on a writ of error sued out by the people, under the provisions of section 500, chapter 48, '35 C. S. A., to review a judgment of acquittal in a criminal case.

An information in two counts was filed against George Harris, defendant in error, under section 90, chapter 97, '35 C. S. A., charging in the first count that he "did wilfully and unlawfully loiter about and patrol the streets of the City and County of Denver, and the place of business" of the Moore Mortuary "for the purpose of wilfully and unlawfully influencing and

inducing the other persons, whose names are to the District Attorney unknown, not to trade with, buy from, sell to, work for, or have business dealings" with the Moore Mortuary.

The second count charged that the defendant "did wilfully and unlawfully picket the works, buildings, and other place of business and occupation" of the Moore Mortuary, which was "then and there doing and conducting a lawful business." It charged that the picketing was done "for the purpose of wilfully and unlawfully obstructing and interfering with and injuring said lawful business, work and enterprise" of the Moore Mortuary.

The substantive law involved in these charges, section 90, *supra*, reads as follows:

"It shall be unlawful for any person or persons to loiter about or patrol the streets, alleys, roads, highways, trails or place of business of any person, firm or corporation engaged in any lawful business, for the purpose of influencing or inducing others not to trade with, buy from, sell to, work for, or have business dealings with such person, firm or corporation, or to picket the works, mine, building or other place of business or occupation of such other person, persons, firm or corporation, for the purpose of obstructing or interfering with or injuring any lawful business, work or enterprise; provided, that nothing herein shall prevent any person from soliciting trade, custom or business for a competitive business."

Defendant pleaded not guilty. A jury was waived, and the case submitted on a stipulation of facts. Thereon defendant was adjudged not guilty and discharged.

The position of the people is supported here by *amici curiae*, while the attorney general joins with counsel for defendant in urging the invalidity of the statute.

Section 90, *supra*, was enacted by the legislature in 1905. Only one other state, Alabama, has a similar law.¹ No litigation involving its construction has ever reached this court. Perhaps one of the reasons for this situation is that injunctive relief was the usual remedy sought in cases involving picketing in labor disputes. This approach was partially foreclosed by sections 76, 87, chapter 97, '35 C. S. A., prohibiting injunctive relief under such circumstances.

Counsel have ably discussed the development of the social and legal problems involved. Every student of the law will readily admit that changes have occurred since the enactment of section 90, *supra*, relating to labor disputes. . . .

The stipulated facts directly pertaining to this discussion are as follows:

. . . for the purpose of giving publicity to the fact that the Moore Mortuary, Inc., work had been placed on the unfair list, the defendant, George Harris, accompanied by Clifford

Matson, Jr., both of whom are members of Local Union No. 55 of the United Brotherhood of Carpenters and Joiners of America, and Charles Williams, Frank Bryant, Merle Elliott, Clarence Seims, William Wallrath and Arthur Bentz, all of whom are members of Local Union No. 720 of the Hod Carriers and Building Construction Laborers, were directed by the Denver Building Trade Council to Patrol the sidewalks adjoining the Moore Mortuary, Inc., establishment, and to peaceably picket the said construction work which was then being carried on; that the defendant and the other members of the union above named, proceeded to peacefully picket said premises by walking upon the sidewalks of East Seventeenth Avenue and on Clarkson Street adjacent to said premises in groups of two; that the defendant and each of the other persons above named, carried a sign attached to the back of their persons, in substantially the following form, and reading as follows:

THIS JOB
UNFAIR
DENVER BUILDING
TRADES COUNCIL.

. . .

It will be noted that under the stipulated facts the picketing was confined to walking on the sidewalk adjacent to the premises of the Moore Mortuary, Inc., and not on "the place of business of any person," or the "building . . . of such other person." . . .

By the great weight of authority, peaceful picketing, so long as it does not in fact involve fraud, intimidation, breach of the peace, or coercion, has been sustained in many cases. . . . There is no contention here that the picketing was not for a lawful purpose, except as charged in the information. . . .

The exercise of arbitrary power by any department of government, or agency thereof, is inconsistent with our democracy. Our guaranties against the exercise of such arbitrary power are found in the state Constitution, article II, section 35, which provides that "No person shall be deprived of life, liberty or property, without due process of law"; and article II, section 10, that "No law shall be passed impairing the freedom of speech . . ."; and in the federal Constitution, amendment XIV, section 1, "that no state shall deprive

¹ See *Thornhill v. Alabama*, in this section, below. —C.R.

any person of life, liberty or property without due process of law."

It is argued that peaceful picketing is a crime under section 90, *supra*. If the legislative intent requires such a construction, then the law must, within the limits of the stipulated facts, be held to be unconstitutional as being a denial of the freedom of speech. Those who seek reversal necessarily must contend that said section prohibits peaceful picketing of any kind, at any time, at any place near the employer's premises, and in any manner. If this contention is upheld, we have what amounts to an exercise of arbitrary power, in violation of the due-process-of-law provision contained in amendment XIV, *supra*. *Lovell v. City of Griffin*, 303 U. S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949. We are not here concerned with a statute which only regulates peaceful picketing, but one which forbids it. This unqualified prohibition would, in our opinion, violate "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Palko v. Connecticut*, 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288.

In *Senn v. Tile Layers Union*, *supra*, the United States Supreme Court had before it the question of the power of a state to prohibit the granting of an injunction restraining peaceful picketing. Mr. Justice Brandeis, speaking for the court, said (p. 478):

"Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for *freedom of speech is guaranteed by the Federal Constitution*. The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. If the end sought by the unions is not forbidden by the Federal Constitution the State may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends." (Italics ours).

In *Ex parte Lyons* (Cal.), 81 P. (2d) 190, the court had before it contempt pro-

ceedings growing out of a labor dispute. Relating to the constitutional issue of freedom of speech, the court had this to say (p. 193):

"In this state the right to peacefully picket rests upon the constitutional guaranty of the right of free speech. We cannot see how the right to peacefully picket, under the guaranty of free speech, could be confined to cases in which there exists a dispute between an employer and organized labor over hours or conditions of employment, rate of pay, unionization of employees or employment of non-union men and not extended to a dispute between a business man and any citizen or group of citizens who may differ with him on a question of business policy. The guaranty of the right of free speech is general and extends to every class or group of citizens." . . .

MR. JUSTICE BAKKE, specially concurring.

The facts and issues are sufficiently detailed in Mr. Justice Bock's opinion. They require no repetition or reiteration.

While not particularly disagreeing with the majority opinion, or the conclusion reached therein, I think the case is one of the "mountain laboring and bringing forth a mouse." The mouse of unconstitutionality is probably there, but I do not like its color. It is too gray, and not recognizable in the dark. Everyone knows, and the majority opinion admits, that we are going through an experimental period in labor legislation, attended with litigation, and we might just as well have selected a white mouse, the kind ordinarily used in experimentation, because the results are more easily ascertainable under the microscope of critical analysis.

In any event, I choose to rely for the sustaining of the judgment on the assignment of error based upon the trial court's holding that part of the anti-picketing law (1905 act) was impliedly repealed by chapter 59, Session Laws 1933. That such was the case, I shall proceed to demonstrate.

If a criminal act [in our case, one dealing with heretofore called criminal conduct] deals with the same subject as a prior act and is in-

consistent with and repugnant to the prior act, the latter will be repealed by implication to the extent of the inconsistency. 25 R. C. L. 930, §179.

Section 1 of the 1905 act (S. L. '35, p. 160; '35 C. S. A., v. 3, c. 97, §90, *supra*, C. L. §4162) is clearly inconsistent with and repugnant to paragraph (e) section 78, chapter 97, '35 C. S. A., S. L. '33, p. 406, §3. Section 78 reads, in part, as follows:

No court, nor any judge or judges thereof shall have jurisdiction to issue any restraining order or temporary or permanent injunction which in specific or general terms prohibits any person or persons from doing, whether singly or in concert, any of the following acts: . . .

(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof.

Certainly it cannot be urged with any merit that the announced public policy of the state, which will not allow injunctive relief against such conduct, would permit

the same result to be achieved by having a supposed violator arrested and jailed. The repugnancy is so obvious as to be inescapable. Section (e) *supra*, cannot be construed in any way, except as "an indication that the sovereign power no longer desires the former offense [picketing in a labor dispute] to be punished or regarded as criminal." 14 Am. Jur. 777. . . .

In *People v. Ribinovich*, 13 N. Y. Supp. (2d) 135 (1939), a New York court held pickets not guilty of a violation of park rules (though they did carry signs on a park boardwalk), since this was the only way they could picket stores on the boardwalk. The majority opinion referred to the policy expressed in the state anti-injunction law; the minority said that the pickets were free to picket until the constitution was amended. The pickets were members of the Electrical Workers asking consumers not to patronize a store which had bought a non-union electric sign. The court presumably considered irrelevant the fact that the New York Court of Appeals had held that there was no "labor dispute" in such a situation (see "Secondary Appeals," in the next chapter).

THORNHILL v. ALABAMA

Supreme Court of the United States. 1940.
310 U. S. 88; 60 Sup. Ct. 736; 84 L. Ed. 659.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioner, Byron Thornhill, was convicted in the Circuit Court of Tuscaloosa County, Alabama, of the violation of Section 3448 of the State Code of 1923.¹ The Code Section reads as follows:

"Section 3448. Loitering or picketing forbidden.—Any person or persons, who, without a

just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The complaint against petitioner, . . . is phrased substantially in the very words of the statute. The first and second counts

¹ Petitioner was first charged and convicted in the Inferior Court of Tuscaloosa County and sentenced to imprisonment for fifty-nine days in default of payment of a fine of one hundred dollars and costs. Upon appeal to the Circuit Court, another complaint was filed and a trial *de novo* was had pursuant to the local practice. The Circuit Court sentenced petitioner, upon his conviction, to imprisonment for seventy-three days in default of payment of a fine of one hundred dollars and costs.

charge that petitioner, without just cause or legal excuse, did "go near to or loiter about the premises" of the Brown Wood Preserving Company with the intent or purpose of influencing others to adopt one of enumerated courses of conduct. In the third count, the charge is that petitioner "did picket" the works of the Company "for the purpose of hindering, delaying or interfering with or injuring [its] lawful business." Petitioner demurred to the complaint on the grounds, among others, that Section 3448 was repugnant to the Constitution of the United States in that it deprived him of "the right of peaceful assemblage," "the right of freedom of speech," and "the right to petition for redress." The demurrer, so far as the record shows, was not ruled upon, and petitioner pleaded not guilty. The Circuit Court then proceeded to try the case without a jury, one not being asked for or demanded. [Thornhill was found guilty. The court held the law constitutional, as did the Court of Appeals of Alabama] on the authority of two previous decisions in the Alabama courts. *O'Rourke v. City of Birmingham*, 27 Ala. App. 133, 168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209; *Hardie-Tynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657. A petition for certiorari was denied by the Supreme Court of the State. The case is here on certiorari granted because of the importance of the questions presented. . . .

The proofs consist of the testimony of two witnesses for the prosecution.² It appears that petitioner on the morning of his arrest was seen "in company with six or eight other men" "on the picket line" at the plant of the Brown Wood Preserving Company. Some weeks previously a strike order had been issued by a Union, apparently affiliated with the American Federation of Labor, which had as members all but four of the approximately one hundred employees of the plant. Since that

time a picket line with two picket posts of six to eight men each had been maintained around the plant twenty-four hours a day. The picket posts appear to have been on Company property, "on a private entrance for employees, and not on any public road." One witness explained that practically all of the employees live on Company property and get their mail from a post office on Company property and that the Union holds its meetings on Company property. No demand was ever made upon the men not to come on the property. There is no testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation.

The Company scheduled a day for the plant to resume operations. One of the witnesses, Clarence Simpson, who was not a member of the Union, on reporting to the plant on the day indicated, was approached by petitioner who told him that "they were on strike and did not want anybody to go up there to work." None of the other employees said anything to Simpson, who testified: "Neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceful manner, and did not put me in fear; he did not appear to be mad." "I then turned and went back to the house, and did not go to work." The other witness, J. M. Walden, testified: "At the time Mr. Thornhill and Clarence Simpson were talking to each other, there was no one else present, and I heard no harsh words and saw nothing threatening in the manner of either man." For engaging in some or all of these activities, petitioner was arrested, charged, and convicted as described.

First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental

² No evidence was offered on behalf of petitioner.

personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state. . . .

Second. The section in question must be judged upon its face. . . . Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider v. State*, 308 U. S. 147, 162-165; *Hague v. C. I. O.*, 307 U. S. 496, 516; *Lovell v. Griffin*, 303 U. S. 444, 451. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing" is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near v. Minnesota*, 283 U. S. 697, 713. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. . . .

Third. Section 3448 has been applied by the State courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; the purpose of the described activity was

concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer. *O'Rourke v. City of Birmingham*, 27 Ala. App. 133, 168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209. The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute. . . .³

Fourth. We think that Section 3448 is invalid on its face.

The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . .

³ See Hellerstein, *Picketing Legislation and the Courts* (1931), 10 No. Car. L. Rev. 158, 186n.: "A picketer may: (1) Merely observe workers or customers. (2) Communicate information, e. g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: (a) through the use of banners, without speaking, carrying true, untrue or libelous legends; (b) by speaking, (i) in a calm, dispassionate manner, (ii) in a heated, hostile manner, (iii) using abusive epithets and profanity, (iv) yelling loudly, (v) by persisting in making arguments when employees or customers refuse to listen; (c) by offering money or similar inducements to strike breakers. (4) Threaten employees or customers: (a) by the mere presence of the picketer; the presence may be a threat of, (i) physical violence, (ii) social ostracism, being branded in the community as a "scab," (iii) a trade or employees' boycott, i. e., preventing workers from securing employment and refusing to trade with customers, (iv) threatening injury to property; (b) by verbal threats. (5) Assaults and use of violence. (6) Destruction of property. (7) Blocking of entrances and interference with traffic.

"The picketer may engage in a combination of any of the types of conduct enumerated above. The picketing may be carried on singly or in groups; it may be directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both."

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague v. C. I. O.*, 307 U. S. 496; *Schneider v. State*, 308 U. S. 147, 155, 162-63 [both reported above]. See *Senn v. Tile Layers Union*, 301 U. S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. . . .

The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. . . .⁴

⁴ The fact that the activities for which petitioner was arrested and convicted took place on the private property of the Preserving Company is without significance. Petitioner and the other employees were never treated as trespassers, assuming that they could be where the Company owns such a substantial part of the town. . . .

* * * *

The Court on the same day and on the same grounds invalidated an anti-picketing ordinance of Shasta County, California, in *Carlson v. California*, 310 U. S. 106 (1940).

In 1938, after a siege of boycotting of C. I. O. wood by A. F. L. carpenters, Oregon by referendum adopted a stringent anti-picketing law. It put penalties on: (1) unionists and unions which obstructed lawful buying, selling, or transporting, (2) unionists and unions which picketed in the absence of a labor dispute, or boycotted an employer not directly involved in a labor dispute, (3) unions which collected so much in dues as to accumulate a fund larger than was necessary for the purposes of the organization, and (4) unionists and unions which interfered with anyone seeking employment.

"Labor dispute" was defined as a dispute of employees with the immediate employer, over wages, hours, or working conditions in his shop. Excluded were representation questions and rival-union disputes. This definition showed the application of the anti-picketing law, and also modified the Oregon anti-injunction law, which had contained the usual definition of "labor dispute" such as is found in the Norris-LaGuardia Act.

In October 1940 the Oregon supreme court held the statute void, on the authority of *Thornhill v. Alabama* (above). *A. F. L. v. Bain and C. I. O. v. Bain*, 106 Pac. (2d) 544. The court did not pass on the clause limiting union dues.⁵

⁵ A collection of the California anti-picketing ordinances of the 1930's is found in U. S. Senate, Committee on Education and Labor, Subcommittee on Violations of Free Speech and the Rights of Labor (the La Follette committee), *Hearings*, Part 70 (Washington: Government Printing Office, 1941), pp. 25717-832.

In April 1941 Texas made picketing riskier by making the use of force in a labor dispute a felony punishable by between one and two years in jail.—C.R.

CHAPTER THREE

SUSPECT UNION PROJECTS-BOYCOTTS AND OTHERS

To the extent that their reason is not simply the preservation of law and order, general hostility to unionism is the chief reason behind the injunctions, statutes, and policing activities noted in the previous two chapters. General hostility may also lie behind the legal limitations on peaceful activity noted in the present chapter, but in each case a special reason is given for the limitation. The situations involved are ones in which unions engage in strikes or boycotts whose purpose is said by some to be unjustified or which are held unlawful because they cause money loss to innocent third parties or which for some other reason are thought to be basically wrong.¹

The first union devices considered are boycotts—unions' attempts to cut off the trade of recalcitrant companies. The first two groups taken up are boycotts through consumers, in which the union appeals to ultimate consumers not to buy non-union goods.

If the union is in the retail or service field, it can set up a picket line which will appeal to customers (as well as to employees). It may do this at the same time as it strikes, but we shall take note especially of cases of picketing in the absence of a strike, since these are more likely to be brought into court. The objection to the unionists in these cases essentially is that they are *outsiders*. The foreground demand of the union on the non-union company in these cases is recognition (sometimes the closed shop), whether the employees happen to want it or not.

If the union is not in the retail or service field, it may be in an industry which supplies goods to those fields. If so, it may appeal to the consumers of that field by circulating an "unfair" list or, what is more effective, carry-

ing on "secondary picketing" in front of the retail outlets of its industry. This practice is objectionable in the minds of more people than is mere "picketing in the absence of a strike," since it annoys and injures the retailers as well as the company which is being aimed at.

The second main sort of boycott to be taken up is the sort which tries to injure a company's trade by using "sympathetic action" to put economic pressure on firms which do business with it. Refusals to handle non-union materials are the most frequent type. Sympathetic strikes extend that refusal to the point of refusing to handle anything till the second company has induced the first to give in. Sometimes the sympathetic strike is extended to firms that have no direct connection with the first company, partly in the hope that they can influence it, partly as a dramatic appeal, usually unsuccessful, to the public. If made broad enough, this extension amounts to a general strike.

A union may use any of these boycotts, instead of against a non-union firm, against a firm which recognizes a rival union. Unless the rival is clearly a fraud, courts are likely to be more severe in judging boycotts against rival unions, since the union is injuring not only the employer but also the rival. Similarly, since as we shall see, many courts disapprove of closed shop demands in strikes, where these demands are made in a boycott a court will have double reason for disapproving.² Closed unions will be treated along

¹ If the peaceful acts of unionists in support of these projects are forbidden, *a fortiori* acts of intimidation in support of them will be forbidden.—C.R.

² Similarly, if pickets engage in misrepresentation, this will aggravate their offense, as we shall see in various cases in this chapter. Occasionally, in a strike, it is the only offense of which they are accused. It is more frequently charged in boycott cases, in which pickets are apt to allege that there is a strike. Legally, misrepresentation is often labeled fraud and put in a class with violence, for instance in the Norris-LaGuardia Act.—C.R.

with the question of the closed shop, since the former is often thought of as an extension or aggravation of the latter.

A boycott which has aroused considerable resentment is that which leads to the picketing of a shop with no employees, where the owner and his family do all the work. Such boycotts are usually held illegal, even under anti-injunction laws. A related demand sometimes made by a union is that the owner shall not do any of the work. His freedom to work is the next topic considered.

If a union engages in monopolistic price-raising it will do it in collaboration with a trade association with which it deals and from which it expects a return for its aid. In form this activity is a boycott; the union refuses to deal with firms that do not agree to

the association's minimum prices, just as it more frequently refuses to deal with firms that do business with a company on which the union is centering an attack.

Breach of contract is something of which unions and employers often accuse each other, and courts are sometimes called on to decide between the parties. Sympathetic strikes are doubly suspect if the sympathizing union walks out at a plant with whose management it has an unexpired contract. It will be convenient to consider here not only company charges against unions, but also union charges of agreement-breaking by companies, since, in legal theory, breach of contract by either side has the same standing in court. (Other legally enforceable rights of unions are discussed in Chapter 4 and 5.)

I. "OUTSIDERS'" APPEALS TO CONSUMERS

Unionists sometimes picket retail stores, restaurants, garages, and other places frequented by ultimate consumers in order to induce the consumers not to trade there, so that the owners will be more inclined to deal with the union. Sometimes the union has no members working in the place which it pickets, but it hopes that the employees will become members, partly through pressure from the owners.

In the next section, another sort of situation is discussed in which unions appeal to consumers, in that case through "secondary picketing," that is, getting at a manufacturer through the retailers to whom he sells.

We shall see that a frequent demand in both these sorts of case is the closed shop. Sometimes the union is in competition with a rival union, which may have a majority of the employees in its ranks. Both these questions are given further, separate treatment in later sections.

Both in connection with the "outsiders'" picketing and in connection with the "secondary" picketing firms frequently complain

that the union misrepresents the situation to the public, perhaps by claiming that there is a strike; a firm may consider it unjust that a union claims it is "unfair to organized labor."

While the type case in these groups involves appeals to consumers when they buy at a retail store, the first case to be reported here is *Senn's*, a tile-layer who probably sold his services only to building contractors. The picketing done by the union was, however, not dissimilar to that used in consumer cases, and the central problem is the same: Are outsiders free to interfere in a business? *Senn's* case is a leading case in the field of freedom of communication by unions, with which Chapters 2 and 3 deal, and in the interpretation of anti-injunction laws. It is followed by four other cases, in which retail establishments (including a restaurant and a beauty shop) were involved. Two of these—the *Lauf* and *New Negro* cases—involve interpretation of the federal anti-injunction law. *Crosby v. Rath* and *A. F. L. v. Swing* involve no anti-injunction law.

SENN *v.* TILE LAYERS

Supreme Court of the United States. 1937.
301 U. S. 468; 57 Sup. Ct. 857; 81 L. Ed. 1229.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case presents the question whether the provisions of the Wisconsin Labor Code which authorize giving publicity to labor disputes, declare peaceful picketing and patrolling lawful¹ and prohibit granting of an injunction against such conduct, violate, as here construed and applied, the due process clause or equal protection clause of the Fourteenth Amendment. . . .

On December 28, 1935, Senn brought this suit in the Circuit Court of Milwaukee County, against Tile Layers Protective Union, Local No. 5, Tile Layers Helpers Union, Local No. 47, and their business agents, seeking an injunction to restrain picketing, and particularly "publishing, stating or proclaiming that the plaintiff is unfair to organized labor or to the defendant unions"; and also to restrain some other acts which have since been discontinued, and are not now material. The defendants answered; and the case was heard upon extensive evidence. The trial court found the following facts.

The journeymen tile layers at Milwaukee were, to a large extent, members of Tile Layers Protective Union, Local No. 5, and the helpers, members of Tile Layers Helpers Union, Local No. 47. Senn was engaged at Milwaukee in the tile contracting business under the name of "Paul Senn & Co., Tile Contracting." His business was a small one, conducted, in the main, from his residence, with a showroom elsewhere. He employed one or two journeymen tile layers and one or two

helpers, depending upon the amount of work he had contracted to do at the time. But, working with his own hands with tools of the trade, he performed personally on the jobs much work of a character commonly done by a tile layer or a helper. Neither Senn, nor any of his employees, was at the time this suit was begun a member of either union, and neither had any contractual relations with them. Indeed, Senn could not become a member of the tile layers union, since its constitution and rules require, among other things, that a journeyman tile setter shall have acquired his practical experience through an apprenticeship of not less than three years, and Senn had not served such an apprenticeship.

For some years the tile laying industry had been in a demoralized state because of lack of building operations; and members of the union had been in competition with non-union tile layers and helpers in their effort to secure work. The tile contractors by whom members of the unions were employed had entered into collective bargaining agreements with the unions governing wages, hours and working conditions. The wages paid by the union contractors had for some time been higher than those paid by Senn to his employees.

Because of the peculiar composition of the industry, which consists of employers with small numbers of employees, the unions had found it necessary for the protection of the individual rights of their members in the prosecution of their trade to require all employers agreeing to conduct a union shop to assent to the following provision:

"Article III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but

¹ Lawful—that is, neither a damage suit nor an injunction suit may be brought because of those union actions. The Wisconsin statute was much like the Norris-LaGuardia Act, but it went further, since it banned damage as well as injunction suits where labor conduct was peaceful.—C.R.

that the installation of all materials claimed by the party of the second part as listed under the caption 'Classification of Work' in this agreement, shall be done by journeymen members of the Tile Layers Protective Union Local #5."

The unions endeavored to induce Senn to become a union contractor; and requested him to execute an agreement in form substantially identical with that entered into by the Milwaukee contractors who employ union men. Senn expressed a willingness to execute the agreement provided Article III was eliminated. The union declared that this was impossible; that the inclusion of the provision was essential to the unions' interests in maintaining wage standards and spreading work among their members; and, moreover, that to eliminate Article III from the contract with Senn 'would discriminate against existing union contractors, all of whom had signed agreements containing the Article. As the unions declared its elimination impossible, Senn refused to sign the agreement and unionize his shop. Because of his refusal, the unions picketed his place of business. The picketing was peaceful, without violence, and without any unlawful act. . . .

. . . The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution.

Third. Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. If the end sought by the unions is not forbidden by the Federal Constitution the State may authorize working men to seek to attain it by combining as pickets,

just as it permits capitalists and employers to combine in other ways to attain their desired economic ends. The Legislature of Wisconsin has declared that "peaceful picketing and patrolling" on the public streets and places shall be permissible "whether engaged in singly or in numbers" provided this is done "without intimidation or coercion" and free from "fraud, violence, breach of the peace or threat thereof." The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act. It precludes the intimidation of customers. It precludes any form of physical obstruction or interference with the plaintiff's business. It authorizes giving publicity to the existence of the dispute "whether by advertising, patrolling any public streets or places where any person or persons may lawfully be"; but precludes misrepresentation of the facts of the controversy. And it declares that "nothing herein shall be construed to legalize a secondary boycott." See *Duplex Printing Co. v. Deering*, 254 U. S. 443, 466. Inherently, the means authorized are clearly unobjectionable. In declaring such picketing permissible Wisconsin has put this means of publicity on a par with advertisements in the press.

The state courts found that the unions observed the limitations prescribed by the statute. The conduct complained of is patrol with banners by two or four pickets. Compare *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 207. The picketing was peaceful. The publicity did not involve a misrepresentation of fact; nor was any claim made below that relevant facts were suppressed. Senn did not contend that it was untruthful to characterize him as "unfair," if the requirement that he refrain from working with his own hands was a lawful one. He did not ask that the banners be required to carry a fuller statement of the facts. Compare *American Furniture Co. v. I. B. etc.* 222 Wis. 338, 340, 347, 268 N. W. 250,

251, 255. Moreover, it was confessedly open to Senn to disclose the facts in such manner and in such detail as he deemed desirable, and on the strength of the facts to seek the patronage of the public.

Truax v. Corrigan, 257 U. S. 312, is not applicable. The statute there in question was deemed to have been applied to legalize conduct which was not simply peaceful picketing, not "lawful persuasion or inducing," not "a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage." It consisted of libelous attacks and abusive epithets against the employer and his friends; libelous and disparaging statements against the plaintiff's business; threats and intimidation directed against customers and employees. The means employed, in other words, were deemed to constitute "an admitted tort," conduct unlawful prior to the statute challenged. See pp. 327-8, 337, 346. In the present case the only means authorized by the statute and in fact resorted to by the unions have been peaceful and accompanied by no unlawful act. It follows, that if the end sought is constitutional—if the unions may constitutionally induce Senn to agree to refrain from exercising the right to work in his business with his own hands, their acts were lawful.

Fourth. The end sought by the unions is not unconstitutional. Article III, which the unions seek to have Senn accept, was found by the state courts to be not arbitrary or capricious, but a reasonable rule "adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry." That finding is amply supported by the evidence. There is no basis for a suggestion that the unions' request that Senn refrain from working with his own hands, or their employment of picketing and publicity, was malicious; or that there was a desire to injure Senn. The sole purpose of

the picketing was to acquaint the public with the facts and, by gaining its support, to induce Senn to unionize his shop. There was no effort to induce Senn to do an unlawful thing. . . .

Fifth. There is nothing in the Federal Constitution which forbids unions from competing with nonunion concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public, each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare *Pennsylvania Railroad Co. v. United States Railroad Labor Board*, 261 U. S. 72. It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right. . . .

Affirmed.

MR. JUSTICE BUTLER, dissenting.

. . . The object that defendants seek to attain is an unlawful one.

Admittedly, it is to compel plaintiff to quit work as helper or tile layer. Their

purpose is not to establish on his jobs better wages, hours, or conditions. If permitted, plaintiff would employ union men and adhere to union requirements as to pay and hours. But, solely because he works, the unions refuse to allow him to unionize and carry on his business. By picketing, the unions would prevent him working on jobs he obtained from others and so destroy that business. Then, by enforcement of their rules they would prevent him from working as a journeyman for employers approved by the union or upon any job employing union men. Adhering to the thought that there is not enough work to go around, unquestionably the union purpose is to eliminate him from all tile laying work. And highly confirmatory of that purpose is the failure of the contract proposed by the union to permit plaintiff personally to do work in the performance of jobs undertaken by him for prices based upon union rates of pay for all labor, including his own.

The principles governing competition between rival individuals seeking contracts or opportunity to work as journeymen cannot reasonably be applied in this case. Neither the union nor its members take tile laying contracts. Their interests are confined to employment of helpers and layers, their wages, hours or service, etc. The contest is not between unionized and other contractors or between one employer and another. The immediate issue is between the unions and plaintiff in respect of his right to work in the performance of his own jobs. If as to that they shall succeed, then will come the enforcement of their rules which make him ineligible to work as a journeyman. It cannot be said that, if he should be prevented from laboring as helper or layer, the work for union men to do would be increased. The unions exclude their members from jobs taken by non-union employers. About half the tile contractors are not unionized. More than 60 per cent of the tile layers are non-union men. The value of plaintiff's labor

as helper and tile layer is very small—about \$750 per year. Between union members and plaintiff there is no immediate or direct competition. If under existing circumstances there ever can be any, it must come about through a chain of unpredictable events making its occurrence a mere matter of speculation. The interest of the unions in the manual labor done by plaintiff is so remote, indirect and minute that they have no standing as competitors. *Berry v. Donovan*, 188 Mass. 353, 358. Under the circumstances here disclosed, the conduct of the unions was arbitrary and oppressive. *Roraback v. Motion Picture Machine Operator's Union*, 140 Minn. 481, 486. *Hughes v. Motion Picture Operators' Union*, 282 Mo. 304.

Moreover, the picketing was unlawful because the signs used constitute a misrepresentation of the facts. One of them declared plaintiff "unfair" to the tile layers union and, upon the basis of that statement, the other sign solicited tile work for union tile layers. There was given neither definition of the word nor any fact on which the accusation was based. By the charge made, there was implied something unjust or inequitable in his attitude toward labor unions. But there was no foundation of fact for any such accusation. There was no warrant for characterizing him as "unfair" or opposed to any legitimate purpose of the tile layers union or as unjust to union men. . . .

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND join in this dissent.

The majority's statement (in its third point) that free speech is guaranteed by the Constitution foreshadowed several decisions of 1937-41 reported in Chapters 1 and 2. The decision implied² that the federal anti-injunction law was constitutional—a point settled in the *Lauf* decision.

² See Stein and others, *Labor Problems in America*, pp. 634-36.—C R.

LAUF *v.* E. G. SHINNER & COMPANY

Supreme Court of the United States. 1938.

303 U. S. 323; 58 Sup. Ct. 578; 82 L. Ed. 872.

MR. JUSTICE ROBERTS delivered the opinion of the Court. . . .

The District Court found the following facts: The respondent is a Delaware corporation maintaining five meat markets in Milwaukee, Wis. The petitioners are, respectively, an unincorporated labor union and its business manager, citizens and residents of Wisconsin. The respondent's employees number about thirty-five; none of them are members of the petitioning union. The petitioners made demand upon the respondent to require its employees, as a condition of their continued employment, to become members of the union. The respondent notified the employees that they were free to do this and that it was willing to permit them to join, but they declined and refused to join. The union had not been chosen by the employees to represent them in any matter connected with the respondent. For the purpose of coercing the respondent to require its employees to join the union and to accept it as their bargaining agent and representative, as a condition of continued employment, and for the purpose of injuring and destroying the business if the respondent refused to yield to such coercion, the petitioners conspired to do the following things, and did them: They caused false and misleading signs to be placed before the respondent's markets; caused persons who were not respondent's employees to parade and picket before the markets; falsely accused respondent of being unfair to organized labor in its dealings with employees, and, by molestation, annoyance, threats, and intimidation, prevented patrons and prospective patrons of respondent from patronizing its markets; respondent suffered and will suffer irreparable injury from the continuance of the practice, and customers will be intimi-

dated and restrained from patronizing the stores as a consequence of petitioners' acts. There is more than \$3,000 involved in the controversy.

The District Court held that no labor dispute, as defined by federal or state law, exists between the respondent and the petitioners or either of them; that the respondent is bound to permit its employees free agency in the matter of choice of union organization or representation; and that the respondent had no adequate remedy at law. It entered a final decree enjoining the petitioners from seeking to coerce the respondent to discharge any of its employees for refusal to join the union or to coerce the respondent to compel employees to become members of the organization, from advertising that the respondent is unfair to organized labor, and from annoying or molesting patrons or persuading or soliciting customers, present or prospective, not to patronize the respondent's markets. . . .

The institution of the suit in the federal court is justified by the findings as to diversity of citizenship and the amount in controversy. As the acts complained of occurred in Wisconsin, the law of that state governs the substantive rights of the parties. But the power of the court to grant the relief prayed depends upon the jurisdiction conferred upon it by the statutes of the United States.

First. The District Court erred in holding that no labor dispute, as defined by the law of Wisconsin, existed between the parties. . . .

Second. . . . A Wisconsin court could not enjoin acts declared by the statute to be lawful; and the District Court has no greater power to do so. The error into which the court fell as to the existence of a labor dispute led it into the further error

of issuing an order so sweeping as to enjoin acts made lawful by the state statute. The decree forbade all picketing, all advertising that the respondent was unfair to organized labor, and all persuasion and solicitation of customers or prospective customers not to trade with respondent.

Third. The District Court erred in granting an injunction in the absence of findings which the Norris-LaGuardia Act [Section 7] makes prerequisites to the exercise of jurisdiction. . . .

Fourth. The Court of Appeals erred in holding that the declarations of policy in the Norris-LaGuardia Act and the Wisconsin Labor Code, to the effect that employees are to have full freedom of association, self-organization, and designation of representatives of their own choosing, free from interference, restraint, or coercion of their employers, puts this case outside the scope of both acts, since respondent cannot accede to the petitioners' demands upon it without disregarding the policy declared by the statutes. . . .

Reversed and remanded.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE BUTLER, dissenting.

The opinion just announced reflects faithfully though quite nakedly the findings of fact. These and uncontradicted details disclose the circumstantial basis of the suit. Local No. 73 is an unincorporated labor union, never in any way related to respondent. None of its employees is a member of the union; all have definitely rejected the suggestion that they join it. In every legal sense, the union is a stranger both to respondent and its employees. Shortly before petitioners conspired to destroy respondent's business, one Joyce, of the American Federation of Labor, called by telephone respondent's vice president, Russell, at his Chicago office. The latter's uncontradicted narration of the conversa-

tion follows: "Mr. Joyce . . . said 'We are in Milwaukee and want you fellows to join our Union up there. They tell me up there you are the man I must see, to get a contract signed for Shinner & Company with the Butchers Union up there.' I told him I could not sign any contract with him, that our men had their own association and were perfectly well satisfied, and didn't want to belong to any other union. He said 'Well, I am going there tonight and if you don't join I will declare war on you.' I said 'There is nothing I can do about it.' He said 'All right, the war is on, and may the best man win,' and he hung up."

Then followed a demand by the union that respondent compel its employees, on pain of dismissal from their employment, to join the union and constitute it their bargaining representative and agent. Respondent rightly declined to undertake any such interference with the liberty of its employees, but informed them that they were free to do as they saw fit. . . .

1. Respondent's business constitutes a property right; and the free opportunity of respondent and its customers to deal with one another in that business is an incident inseparable therefrom. It is hard to imagine a case which more clearly calls for equitable relief; and the court below rightly granted an injunction. *Truax v. Corrigan*, 257 U. S. 312, 327 [reported in a previous chapter]. . . . If respondent had joined the conspiracy and yielded to the demand of the union, its action as an employer of labor unquestionably would have constituted an "interference, restraint, or coercion" of its employees in the designation of their representatives, in the teeth of the declared policy of the act.

The opinion of the Court asserts, however, that this definite declaration of policy in no way narrows the definition of the phrase "labor dispute" found in substantive provisions of the act. But that statement cannot be intended to suggest that the declaration of policy does not affect the

meaning and application of the words used, for the opening clause of that declaration is precisely to the contrary. Whether a labor dispute exists in a given case depends upon the facts; and in each case the phrase "labor dispute" is to be interpreted in harmony with the declared policy of the act. . . .

2. But, putting aside the congressional declaration of policy as an indication of meaning, and considering the phrase entirely apart, the facts of this case plainly do not constitute a "labor dispute" as defined by the act. . . .

There being an utter lack of connection between the petitioners and respondent or its employees, the union was an intruder into the affairs of the employer and its employees. . . .

3. As to what constitutes a "labor dispute" within the meaning of the Wisconsin statute, the interpretation put upon it by the highest court of that state is binding here. . . . But this Court authoritatively declares the meaning of acts of Congress and is required to decide for itself what constitutes a "labor dispute," which, within the meaning of the Norris-LaGuardia Act, will have the effect of abridging the jurisdiction of a federal court.

The things here found to have been done for the purpose of coercing respondent to compel its employees to join the union are not declared lawful by the Wisconsin statute or by the courts of that state. . . . While this Court refrains from condemning the means employed by pe-

titioners, the opinion contains nothing to suggest that their conduct was not wrongful and unlawful. The publicity and peaceful picketing declared legal by Wisconsin laws are utterly unlike the display of libelous signs, parade of pickets, false accusations, molestation, threats, and intimidation employed by the union, not on behalf of former or present employees of respondent, but to destroy the business of respondent. . . .

4. The case is a simple one. Respondent's employees had no connection with the union, and were unwilling to have any. The union, being unable to persuade the employees to assent to its wishes in that regard, undertook to subjugate them to its will by coercing an unlawful interference with their freedom of action on the part of the employer. If that is a "labor dispute," destructive of the historical power of equity to intervene, then the Norris-LaGuardia Act attempts to legalize an arbitrary and alien state of affairs wholly at variance with those principles of constitutional liberty by which the exercise of despotic power hitherto has been curbed. And nothing is plainer under our decisions than that, if the act does that, its effect will be to deprive the respondent of its property and business without due process of law, in contravention of the Fifth Amendment. *Truax v. Corrigan*, *supra*, 257 U. S. 312, 327, 328. . . .

MR. JUSTICE McREYNOLDS concurs in this opinion.

CROSBY v. RATH

Supreme Court of Ohio. 1940.
136 Ohio St. 352; 25 N. E. (2d) 934.

The plaintiff . . . the operator of a restaurant in the city of Cleveland . . . asks an injunction to restrain the defendants from continuing certain acts of violence¹ . . . to . . . compel her to dis-

charge her employees unless they become members of one of the defendant unions.

. . . The evidence . . . discloses that the plaintiff's present employees are not

¹ Our interest in this case is not in whether the court will forbid violence, but whether it will go

further and forbid even peaceful picketing, either because of the past violence or for some other reason.
—C.R.

members of a union or represented thereby; that they do not desire such membership; that each employee is serving under a renewable, written, three-month contract; that in selecting her employees the plaintiff makes no inquiry as to such membership; that in a number of instances she has employed union members; that when asked by her employees for advice on this subject she tells them to follow their own preference; that she never has discharged an employee because of membership in a union; that there is no dispute between the plaintiff and her employees; that she has permitted a representative of the defendant unions to solicit her employees; that the defendants do not complain about the wages paid by the plaintiff to her employees; that the defendants do not accuse the plaintiff of underselling restaurants employing union members exclusively; that on October 4, 1937, the defendants began to picket plaintiff's restaurant; that the number of persons engaged in picketing varied from 40 to 100; that these persons wore union badges and obstructed the entrance to the plaintiff's restaurant; that they called the plaintiff's employees vile and obscene names; that they threatened, assaulted, struck and injured some of the plaintiff's employees, one of whom suffered a fractured jaw; that plaintiff's restaurant was stenchbombed on two occasions; that a dynamite bomb was exploded at the place of the plaintiff's former residence; that an attempt was made to bomb the plaintiff's present residence; that the home of one of the plaintiff's employees was stenchbombed; that the homes of some of the plaintiff's customers were stenchbombed; that some of the plaintiff's customers who drove to her restaurant found the tires of their automobiles cut and punctured while there; that anyone attempting to deliver supplies to plaintiff's restaurant was insulted and threatened; that one delivery truck driven by a union driver was seized and partially burned; and that during the period of

picketing the plaintiff's business was reduced to approximately one-third of its former volume. The defendants disclaim responsibility for the above-enumerated acts of violence and insist that the contracts existing between the plaintiff and her employees are invalid.

The Common Pleas Court rendered a decree in favor of the plaintiff. The employment contracts were held valid, and the court found that no legitimate trade dispute was involved. The defendants were enjoined from picketing or boycotting the plaintiff's restaurant and from interfering with the operation of the plaintiff's business.

Upon appeal to the Court of Appeals on questions of law and fact the decree of the court was the same as that of the Common Pleas Court except that [peaceful] picketing and boycotting were permitted.

The case is in this court for review upon the allowance of a motion to certify the record.

BY THE COURT: ² The question as to the validity of the three-month, written, renewable employment contracts here involved requires no discussion. Both the Common Pleas Court and the Court of Appeals held them valid, and a study of the record discloses nothing tending to support the contention of the defendants to the contrary.³

The controlling question in the case is whether the evidence discloses the existence of a legitimate trade dispute. However, the difficulty is simplified by the fact

² Four of the seven judges join in this opinion.—C.R.

³ Presumably the court finds picketing by a union which is now an "outsider" wrong, independently of whether the employer has time-contracts with her employees. Why are the contracts mentioned? Is it wrong for the union to try to "induce a breach" of them? Cf. the discussion of anti-union or yellow-dog contracts in the previous chapter (including a mention of the "contract" aspects of the *LaFrance* and the *Exchange* cases, which are quoted by the majority and dissenting opinions, respectively, in the *Crosby* case, but without reference to the "contract" aspects).—C.R.

that both the plaintiff and the defendants rely upon the decision of this court in the case of *La France Electrical Const. & Supply Co. v. International Brotherhood of Electrical Workers*, 108 Ohio St., 61, 140 N. E., 899, subsequently cited with approval in the case of *State ex. rel. United District Heating, Inc., v. State Office Building Commission*, 125 Ohio St., 301, 181 N. E., 129. In the *La France* case this court gave careful consideration to the principles of law relating to the subject of trade disputes, and affirmed the decision of the lower courts permitting the picketing of the employer's plant. But in the opinion it is clearly pointed out that "Upon the record with regard to this point there can be little doubt that a legitimate trade dispute existed in this case, in which former employees of the plaintiff company were seeking to secure the right to work with the company under terms of employment different from those which their employer was at the time requiring. That being the case, the methods open to use in a legitimate trade dispute were open to strikers here." Of course, as already indicated in the factual statement, it is not even contended that in the instant case there is any dispute whatsoever between the plaintiff and her employees, as in the *La France* case, *supra*. On the contrary, the only dispute in the instant case is between the plaintiff and the defendants with whom the plaintiff's employees have no connection. The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances. That this must be the law is clearly indicated by the intolerable and unexplainable predicament in which an employer might well find himself if picketed by two or more hostile unions with each one insisting that the employer dis-

charge his employees unless they become members of that particular union alone.

Finally it should be noted that the instant situation is concededly unaffected by statute. This clearly distinguishes the case from most of the authorities relied upon by the defendants.

Two recent decisions restating the generally accepted rule are to be found in the cases of *Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. (2d), 308 [reported below], and *Roth v. Local Union [Ind.]* 24 N. E. (2d) 280. In the former case one paragraph of the syllabus reads in part as follows:

"The right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights equally sacred, and the privilege of free speech can not be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities in interference with another's business. . . ."

The decree of the Court of Appeals must be reversed to the extent that it permits picketing and boycotting. Final judgment is hereby rendered in conformity with the decree of the Common Pleas Court.

Judgment reversed in part.

MYERS, J., concurring.

Since the case is in equity, the pleas of both plaintiff and defendants are addressed to the trial court as a chancellor. All elements of the case are to be considered. The conduct of the parties will be carefully scrutinized to determine whether they are entitled to relief or protection of the court. From a consideration of the entire record, the trial court was justified in its finding that there was a proximate connection between the acts of defendants and the violence charged. In respect to the plaintiff's place of business, the defendants have therefore forfeited whatever rights they might otherwise have had peaceably to picket under the law. Rights peaceably exercised will be protected by the courts but such protection is forfeited when the attempted exercise thereof is accompanied

by acts of violence as in the instant case.⁴

For the reasons stated I concur in the judgment only.

DAY, J., dissenting.

I dissent from the view of the majority of this court.

The Common Pleas Court granted an injunction, restraining all picketing, bannering and boycotting of plaintiff's restaurant. On hearing *de novo*, the Court of Appeals permitted picketing and bannering, which judgment is here for review. The record discloses that picketing was not accompanied by violence following the judgment of that court. It is the judgment of the Court of Appeals which is here for review, and that judgment did not permit picketing accompanied by violence.

Peaceful picketing, by carrying placards, signs, distribution of literature, or by oral speech, is not, in and of itself, unlawful. It is a lawful right emanating from and protected by the constitutional provision governing the exercise of free speech.

The judgment of the Court of Appeals should be affirmed.

ZIMMERMAN, J., dissenting.

From a reading of the majority opinion, this case would appear to be wholly one-sided. However, such is not the fact and the writer believes the position of the defendants, supported by ample and respectable authority, is entitled to expression.

Having had a strict injunction issued against them in the Common Pleas Court forbidding any "picketing," the defendants appealed the cause on questions of law and fact to the Court of Appeals. . . .

Apparently following the principles enunciated in the case of *S. A. Clark Lunch Co. v. Cleveland Waiters & Beverage Dis-*

pensers Local, 22 Ohio App., 265, 154 N. E. 362, it was "ordered, decreed and adjudged," subject to the limitations of laws or ordinances as to the use of streets and sidewalks, that the defendant unions might maintain two moving representatives near the front of the restaurant and one at the rear entrance for the sole purpose of informing the public orally, or by handbills and signs, that Mrs. Crosby does not employ union help, and to request that the restaurant be not patronized for that reason; such activities to be conducted in a quiet, orderly fashion, and so as not to interfere with any person desiring to enter or leave the restaurant for any purpose.

The defendants, and those having notice of the order, were enjoined from molesting, interfering with, or annoying Mrs. Crosby and her employees in any manner.

Was such decree reasonable, proper and lawful? A majority of this court holds in effect it was not, adopting the attitude that "peaceful picketing" is only authorized when a *bona fide* trade or labor dispute exists directly between an employer and his employees, as concerns wages, hours, working conditions, etc. . . .

With due deference for the opinion of his associates, the writer of this dissent submits that the general view taken by the majority is too narrow, and that the *La France* case, upon its facts, is not authority for the proposition that "peaceful picketing" may be resorted to only in the event of a strike.

Acts of violence perpetrated against Mrs. Crosby, her employees and customers are mentioned in the majority opinion. It is to be borne in mind that these occurred prior to the issuance of the injunction by the Common Pleas Court, that the defendants disclaim responsibility therefor, and that there is a lack of evidence implicating them.

Be that as it may, such conduct, by whomsoever carried on, can not be defended, condoned or sanctioned.

⁴ The doctrine that a union which uses violence forfeits its freedom to picket peacefully is considered in connection with the *Meadowmoor* case in Chapter 1. See also *May's Furs v. Bauer*, 282 N. Y. 331, 26 N. E. (2d) 279 (1940), which gives the union more benefit of doubt.—C.R.

Responsible labor leaders realize that the pursuit of illegal methods to bring about what may be a desirable result is harmful to the labor movement as a whole, and arouses public opinion against the cause of organized labor.

However, we are not here concerned with the past. Our primary function is to determine whether the order of the Court of Appeals for the future should remain undisturbed. *J. H. & S. Theatres, Inc.*, v. *Fay*, 260 N. Y., 315, 320, 183 N. E. 509, 511. Or, as it was put in *Fenske Bros. Inc.*, v. *Upholsterers International Union*, 358 Ill., 239, 260, 193 N. E., 112, 121: "The mere fact that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceable persuasion."

No one will seriously deny that organized labor has done as much if not more than any other single agency to improve the lot of working people as a class. Increased wages, shorter hours, better working conditions and a higher standard of living can be ascribed in an important degree to its activities and influence. The struggle has been long and arduous, and the continued existence of labor organizations as effective bodies is dependent upon progress.

While, of course, no employer can be compelled to hire union workmen, and no workman can be forced to join a labor union, organized labor should have the privilege, in a reasonable, peaceable and orderly way, of advising the public, if it so desires and for what it may be worth, of the truth concerning an employer of labor, especially where the practices followed and the policies pursued by such employer are opposed to the interests of union labor, and are considered deleterious to employees generally, or to employees engaged in a particular kind of work. The defendants strongly urge that such is the situation as concerns the Crosby restaurant, and testimony in the record is pointed out as supporting the contention.

Irrespective of special legislation on the subject of which there is none in Ohio, the term "trade dispute," or "labor dispute," according to the liberal judicial concept, has a broader and more comprehensive meaning than the one given it by the majority of this court.

Such concept is exemplified in the leading case⁵ of *Exchange Bakery & Restaurant, Inc.*, v. *Ri/jkin*, 245 N. Y., 260, 263, 157 N. E., 130, 132, where the court said:

"The purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by principle of collective bargaining. Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally. That they may prevail it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured."

Again, in *Blumauer v. Portland Moving Picture Machine Operators' Protective Union*, 141 Ore., 399, 403, 17 Pac. (2d), 1115, 1116, it was remarked: . . .

"This right of presenting its side of a controversy, organized labor may exercise by lawful means, in a lawful manner when its members have reasonable grounds to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees generally, or of those in a particular trade or calling, even though there may be no direct controversy between the employer and his immediate employees."

⁵ The *Exchange* case was decided in 1927 and on the whole the New York courts have kept to that doctrine.—C.R.

In the later case of *Geo. B. Wallace Co. v. International Association of Mechanics*, 155 Ore., 652, 664, 63 Pac. (2d), 1090, 1095, the same court observed:

"Without any attempt to reconcile all that has been said on the subject, we think the better reasoned cases⁶ are to the effect that a strike and picketing are not necessarily concomitant. There may be a strike without picketing and picketing without a strike. Each is a combative weapon which labor may use to accomplish its objectives if the same be lawful."

And in *Music Hall Theatre v. Moving Picture Machine Operators*, 249 Ky., 639, 642, 61 S. W. (2d), 283, 285, this language appears:

"The law recognizes the right of peaceful picketing. Although that term is sometimes criticized as a contradictory one, since the word 'picketing' is taken from the nomenclature of warfare and is strongly suggestive of a hostile attitude, it has acquired a significance and meaning commonly understood. It connotes peaceable methods of presenting a cause to the public in the vicinity of the employer's premises. Labor has the recognized legal right to acquaint the public with the facts which it regards as unfair, to give notoriety to its cause, and to use persuasive inducements to bring its own policies to triumph."

A number of courts, in the absence of enactments like the Norris-LaGuardia Act (29 U. S. Code, Section 101 *et seq.*), and where no controversy has existed between an employer and his immediate employees, have held "peaceful picketing" lawful, when its avowed design and purpose is to benefit organized labor directly or indirectly. Some of the representative cases are: *United Chain Theatres, Inc., v. Phila. Moving Picture Machine Operators Union* (D. C., Pa.), 50 F. (2d), 189; *Steffes v. Motion Picture Machine Operators Union*, 136 Minn., 200, 161 N. W. 524; *Empire Theatre Co. v. Cloke*, 53

Mont., 183, 163 P., 107, L. R. A. 1917E, 383; *Bomes v. Providence Local No. 223 of Motion Picture Operators*, 51 R. I., 499, 155 A., 581; *Nann v. Raimist*, 255 N. Y. 307, 314, 174 N. E., 690. Compare *People v. Harris*, 104 Colo., 386, 91 P. (2d), 989; *Scofes v. Helmar*, 205 Ind., 596, 187 N. E. 662; *Kirmse v. Adler*, 311 Pa., 78, 166 A., 566.

In *American Furniture Co. v. I. B. of T. C. & H. of A. Chauffeurs, etc., Local, Teamsters & Helpers General Local*, 222 Wis., 338, 359, 268 N. W., 250, 260, the court confidently stated that the proponents of the Norris-LaGuardia Act intended to enact into law the views expressed in *Exchange Bakery & Restaurant v. Rifkin*, *supra*.

Under language as used in such act, it has been expressly held that a "labor dispute," permitting "peaceful picketing" adjacent to an employer's establishment, may exist, even though none of the employees are union members, and there is no altercation between the employer and his employees. *Senn v. Tile Layers Protective Union*, 222 Wis., 383, 268 N. W., 270, affirmed 301 U. S. 468, [reported above; *Lauf* case, reported above; *New Negro* case, reported below;] *L. L. Coryell & Son v. Petroleum Workers Union* (D. C., Minn.), 19 F. Supp., 749.

The opinion has also been advanced that an injunction denying the members of a labor union the right to apprise the public of the true facts in relation to an employer of labor by means of "peaceful picketing," reasonably exercised on a defensible basis, would constitute an infringement of the constitutional guaranty of free speech. *Senn v. Tile Layers Protective Union*, *supra* (301 U. S., 468, 478, 81 L. Ed., 1229, 1236, 57 S. Ct., 857); *People v. Harris*, *supra* (104 Colo., 386, 394, 91 P. [2d], 989, 993). Compare *Schneider v. State of New Jersey (Town of Irvington), etc.*, 308 U. S., 147, 60 S. Ct. 146 [see reports of these three cases, above].

While Mrs. Crosby declares she is not

⁶ The Oregon court, reviewing the "common" or judge-made law on this point (which is what the Ohio court is doing in the Crosby case) comes to the conclusion opposite to that of the Ohio court. Though Oregon had an anti-injunction law, for some reason the court disregarded it.—C.R.

antagonistic toward union labor and has no objection to her employees becoming union members, the record contains instances tending to belie such statements. Particular reference is made to the reaction initially displayed to the suggestion of unionization and the tactics subsequently adopted; to the treatment of a union waitress working for a time at the Crosby restaurant, and to the development when a union organizer attempted to approach the restaurant cooks, who had evinced a friendliness to his overtures.

Furthermore, the representations of the defendants and the conclusion of the Court of Appeals as to the object of the "peaceful picketing" can not be ignored. If it were clear that the dominant motive was to ruin Mrs. Crosby's business from a purely evil incentive rather than to promote the interests of union labor, a different attitude would be in order. . . .⁷

Therefore, it is finally submitted that the judgment of the Court of Appeals is justifiable and should be affirmed.⁸

* * * *

Typically, state supreme courts ban picketing by outsiders, whether the state has an anti-injunction law or not. New York's position is exceptional, whether we consider the *Exchange* decision, made before the New York anti-injunction law, or the similar *May's Furs* decision, made after (see footnotes 4 and 5).

Some of the cases in recent years in which

injunctions against outsiders have been upheld include:

(1) No anti-injunction law. *Retail Clerks v. Lerner Shops*, 193 So. 529 (Fla., 1939) (union demanded closed shop) (dissent). *Lyle v. Local No. 452, Amalgamated Meat Cutters*, 124 S. W. (2d) 701 (Tenn., 1939).

(2) Anti-injunction law no obstacle. *Simon v. Schwachman*, 18 N. E. (2d) 1 (Mass., 1938) (closed shop demand was and is illegal). *Quinton's Market, Inc. v. Patterson*, 21 N. E. (2d) 546 (Mass., 1939) (demand was for Wednesday-afternoon closing, not for closed shop). *Fornili v. Auto Mechanics*, 93 Pac. (2d) 422 (Wash., 1939) (dissent); cf. *Safeway Stores v. Retail Clerks*, 184 Wash. 322, 51 Pac. (2d) 372, (1935). *Swing v. A. F. L.*, 22 N. E. (2d) 857 (Ill., 1939, reversed by the U. S. Supreme Court, February 10, 1941, in an opinion which is reported below).

(3) Anti-injunction law construed to forbid company to compel employees to join or not to join a union, therefore to forbid union to picket company in order to induce it to do so. *Roth v. Local Union*, 24 N. E. (2d) 280 (Ind., 1939).

Lower courts in California construed California's anti-yellow-dog-injunction law in the same way and enjoined outsiders' picketing. In 1940 the state supreme court decided a set of labor cases granting sweeping freedoms to labor unions, including the liberty to picket a non-union shop in order to get union men hired or even to get the closed shop, whether the company pays above or below the union scale. *McKay v. Retail Automobile Salesmen* and other cases, 106 Pac. (2d) 373 (Cal., 1940).

Connecticut's supreme court decided against "outsiders" in a special case, namely one in which they were strikers whose strike had petered out. It decided against them on principle, but said that the strike in question did not seem really to have collapsed. *Loew's Enterprises, Inc. v. International Alliance*, 125 Conn. 391, 6 Atl. (2d) 321 (1939). The court took a very similar view when the same case was before it a little later, after Connecticut had passed an anti-injunction law. This view is very usual.⁹

⁹ A number of states passed laws requiring struck companies to notify applicants for jobs that there was a strike on. It has been held that the statute did

⁷ Judges are fond of contemplating the possibility that the union's motive might be to harm the company rather than to help itself. They say that the former would be illegal and the latter (probably) legal. But it would be very hard to find a strike called without some idea of benefiting the union or the unionists. Presumably they are merely using a rather misleading way of saying that it would be illegal for a union to do great harm to a company when it could benefit rather little (the measure of what is great and little differing from judge to judge). An older form of this misleading method is for a judge to say that the union acted with "malice"; all he means is "without sufficient justification"—in the view of this judge.—C.R.

⁸ The union asked the federal Supreme Court to consider the case, but the Court refused, February 10, 1941.—C.R.

New Jersey is among the states which treats strikers as outsiders after they have been replaced and in general its courts are not favorable to unions. But the New Jersey courts occasionally lean toward the position which we saw the federal and New York courts occupying; they have held that, while a restaurant might not be picketed by strikers whose places had been filled, the unionists might distribute circulars and carry signs 225 feet away from the entrance. *John R. Thompson Co., Inc. v. Delicatessen Workers*, 8 Atl. (2d) 130 (N. J., 1939).

The anti-picketing and anti-leaflet laws treated in Chapter 2 were directed at picketing by outsiders perhaps more than at ordinary picketing. Some of them contained clauses with special limits on outsiders' picketing. An ordinance directed solely at outsiders and at unionists whose strike had petered out was passed by Yakima, Washington. It forbade picketing except by persons who had been employed at the place for as much as three months and who had been

not apply after the strike was ended. *West Allis Foundry Co. v. State*, 186 Wis. 24 (1925). The labor relations acts (we shall see) give strikers some legal claim to reinstatement if a strike is lost, but if the strike peters out and they do not register their claim, it lapses.—C.R.

employed there as recently as 60 days before the picketing. The state supreme court held the ordinance void on the ground that it conflicted with the state anti-injunction law. The dissent held that the town might regulate though not prohibit picketing. *City of Yakima v. Gorham*, 94 Pac. (2d) 180 (Wash., 1939).

The Wisconsin supreme court, at the time it permitted picketing in the *Senn* case (above), also permitted outsiders to picket a retailer in the *American Furniture* case, 222 Wis. 338 (1936), and we saw above that the Supreme Court of the United States interpreted the Wisconsin law (and the Norris-LaGuardia Act) similarly in the *Lauf* case. This all happened despite the fact that the Wisconsin anti-injunction law said that it did not legalize the "secondary boycott." There is no agreement on what is a "secondary" boycott; judges are inclined to give that name to whatever boycotts they decide to enjoin. When in 1939 Wisconsin revised its labor relations act to include limits on unions, it again forbade "secondary boycotts" and this clause may be construed to forbid picketing by outsiders. See *Werb v. Milk Drivers*, C. C. H. Par. 60,049 (Wisconsin, lower court, August 1, 1940).

NEW NEGRO ALLIANCE v. SANITARY GROCERY COMPANY

Supreme Court of the United States. 1938.
303 U. S. 552; 58 Sup. Ct. 703; 82 L. Ed. 1012.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The matter in controversy is whether the case made by the pleadings involves or grows out of a labor dispute within the meaning of section 13 of the Norris-LaGuardia Act. . . .

The following facts alleged in the bill are admitted by the answer: Respondent, a Delaware corporation, operates 255 retail grocery, meat, and vegetable stores, a warehouse and a bakery in the District of Columbia, and employs both white and colored persons. April 3, 1936, it opened a new store at 1936 Eleventh Street N. W.,

installing personnel having an acquaintance with the trade in the vicinity. Petitioner, the New Negro Alliance, is a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises. The individual petitioners are officers of the corporation. The relation of employer and employees does not exist between the respondent and the petitioners or any of them. The petitioners are not engaged in any business competitive with that of the respondent, and the officers, members, or representatives of the Alli-

ance are not engaged in the same business or occupation as the respondent or its employees.

As to other matters of fact, the state of the pleadings may be briefly summarized. The bill asserts: The petitioners have made arbitrary and summary demands upon the respondent that it engage and employ colored persons in managerial and sales positions in the new store and in various other stores; it is essential to the conduct of the business that respondent employ experienced persons in its stores and compliance with the arbitrary demands of defendants would involve the discharge of white employees and their replacement with colored: it is imperative that respondent be free in the selection and control of persons employed by it without interference by the petitioners or others; petitioners have written respondent letters threatening boycott and ruination of its business and notices that by means of announcements, meetings, and advertising the petitioners will circulate statements that respondent is unfair to colored people and to the colored race and, contrary to fact, that respondent does not employ colored persons; respondent has not acceded to these demands. The answer admits the respondent has not acceded to the petitioners' demands, but denies the other allegations and states that the Alliance and its agents have requested only that respondent, in the regular course of personnel changes in its retail stores, give employment to negroes as clerks, particularly in stores patronized largely by colored people; that the petitioners have not requested the discharge of white employees nor sought action which would involve their discharge. It denies the making of the threats described and alleges the only representations threatened by the Alliance or its authorized agents are true representations that named stores of the respondent do not employ negroes as sales persons and that the petitioners have threatened no more than the

use of lawful and peaceable persuasion of members of the community to withhold patronage from particular stores after the respondent's refusal to acknowledge petitioner's requests that it adopt a policy of employing negro clerks in such stores in the regular course of personnel changes.

The bill further alleges that the petitioners and their authorized representatives "have unlawfully conspired with each other to picket, patrol, boycott, and ruin the Plaintiff's business in said stores, and particularly in the store located at 1936 Eleventh Street, Northwest" and, "in an effort to fulfill their threats of coercion and intimidation, actually have caused the said store to be picketed or patrolled during hours of business of the plaintiff, by their members, representatives, officers, agents, servants, and employees"; the pickets carrying large placards charging respondent with being unfair to negroes and reading, "Do your Part! Buy Where You Can Work! No Negroes Employed Here!" for the purpose of intimidating and coercing prospective customers from entering the respondent's store until the respondent accedes to the petitioners' demands. "Said defendants, their pickets or patrols or some of them have jostled and collided with persons in front of the said store and have physically hindered, obstructed, interfered with, delayed, molested, and harassed persons desiring to enter the place of business of the Plaintiff Corporation; said pickets, or some of them, have attempted to dissuade and prevent persons from entering plaintiff's place of business; said defendants, their pickets or patrols are disorderly while picketing or patrolling, and attract crowds to gather in front of said store, and encourage the crowds or members thereof to become disorderly, and to harass, and otherwise annoy, interfere with and attempt to dissuade, and to prevent persons from entering the place of business of the plaintiff, the disorder thereby preventing the proper conduct of and operation of the

plaintiff's business. Defendants have threatened to use similar tactics of picketing and patrolling as aforesaid in front of the several other stores of the plaintiff." Four photographs alleged to portray the picketing are annexed as exhibits to the bill. One of them shows a man carrying a sandwich placard on the sidewalk and no one else within the range of the camera. In another two children are seen beside the picket; in another two adults; in the fourth, one adult entering respondent's store at a distance from the picket and without apparent interference. The answer denies all these allegations save that it admits the petitioners did, during April 4, 1936, and at no other time, cause the store at 1936 Eleventh Street N. W. to be continuously picketed by a single person carrying a placard exhibiting the words quoted by the bill; and the petitioners, prior to the acts complained of in the bill, picketed, or expressed the intention of picketing, two other stores. It admits that the photographs correctly represent the picketing of April 4, 1936. The answer avers the information carried on the placards was true, was not intended to, and did not in fact, intimidate customers; there was no physical obstruction, interference, or harassment of any one desiring to enter the store; there was no disorderly conduct; and the picketing did not cause or encourage crowds to gather in front of the store.

[The definitions in section 13 of the Norris-LaGuardia Act] plainly embrace the controversy which gave rise to the instant suit and classify it as one arising out of a dispute defined as a labor dispute. They leave no doubt that the New Negro Alliance and the individual petitioners are, in contemplation of the act, persons interested in the dispute. . . .

The act does not concern itself with the background or the motives of the dispute. The desire for fair [conditions of work] on the part of persons of any race, color, or persuasion, and the removal of discrimi-

nations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the express terms of the act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color. . . .

The legislative history of the act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that act. It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning "terms and conditions of employment" in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices. The District Court erred in not complying with the provisions of the act. . . .

Reversed and remanded.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

MR. JUSTICE McREYNOLDS, dissenting.
MR. JUSTICE BUTLER and I cannot accept

the view that a "labor dispute" emerges whenever an employer fails to respond to a communication from A, B, and C—irrespective of their race, character, reputation, fitness, previous or present employment—suggesting displeasure because of his choice of employees and their expectation that in the future he will not fail to select men of their complexion.

It seems unbelievable that, in all such circumstances, Congress intended to inhibit courts from extending protection long guaranteed by law and thus, in effect, encourage mobbish interference with the individual's liberty of action. Under the tortured meaning now attributed to the words "labor dispute," no employer—merchant, manufacturer, builder, cobbler, housekeeper or whatnot—who prefers helpers of one color or class can find adequate safeguard against intolerable violations of his freedom if members of some other class, religion, race, or color demand that he give them precedence.

Design thus to promote strife, encourage trespass, and stimulate intimidation,

ought not to be admitted where, as here, not plainly avowed. The ultimate result of the view now approved to the very people whom present petitioners claim to represent, it may be, is prefigured by the grievous plight of minorities in lands where the law has become a mere political instrument.

* * * *

A lower New York court had ruled *against* Negro picketing, before the New York anti-injunction law was passed, warning that picketing by white workers might follow and enough bitterness be engendered to cause race riots. *A. S. Beck Shoe Corp. v. Johnson*, 274 N. Y. Supp. 946 (1934). After the law was passed, a lower New York court held that, while there was no "labor dispute" and the law did not apply, yet protests against "oppression, actual or fancied," should not be enjoined *Anora Amusement Corp. v. Doe*, 12 N. Y. Supp. (2d) 400 (1939).

As the dissent in the *New Negro* case suggests, it will be hard to know where to draw the line if various groups start picketing to get jobs for their members. The presence of a picket might very well lose all significance, anti-injunction laws might be repealed.

AMERICAN FEDERATION OF LABOR *v.* SWING

Supreme Court of the United States. 1941.

— U. S. —; 61 Sup. Ct. 568; 85 L. Ed. 513.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In . . . *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, decided this day [reported in Chapter 1], we held that acts of picketing when blended with violence may have a significance which neutralizes the constitutional immunity which such acts would have in isolation. When we took this case, . . . it seemed to present a similar problem. More thorough study of the record and full argument have reduced the issue to this: is the constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing

merely because there is no immediate employer-employee dispute?

A union of those engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed. To enjoin this interference with his business and with the freedom of his workers not to join a union, Swing and his employees began the present suit. In addition, they charged the use of false placards in picketing and forcible behavior towards Swing's customers. A preliminary injunction was granted. Answers were then filed denying violence as well as falsity of the placards. The union also moved to strike the complaint and the trial court, finding the com-

plaint wanting in equity, granted the motion and dissolved the preliminary injunction.

The appellate court, one of Illinois' intermediate courts of review, held that the trial court was in error. 298 Ill. App. 63. This action of the appellate court was affirmed by the state supreme court. 372 Ill. 91. It found that the complaint properly invoked equity for three reasons: (1) there was no dispute between the employer and his immediate employees; (2) the placards were libelous; (3) there were acts of violence. Inasmuch as the supreme court affirmed the issuance merely of a preliminary injunction, we denied certiorari for want of a final judgment. 309 U. S. 659. Thereupon, although as we have seen issue had been formally joined on the claims of libel and violence, the appellate court, by a procedure unrevealed by the record and without opinion, entered a permanent injunction ranging from peaceful persuasion to acts of violence. The decree recited "that this Court and the Supreme Court of this State have held in this case, that, under the law of this State, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (i. e., where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees." The union sought review of this decree in the supreme court by writ of error. Swing and his employees moved to dismiss the writ because in seeking to obtain it the union had conceded that "all issues of the case have been settled on prior appeal and that the decree entered by the appellate court is in conformity with the mandate issued" to the appellate court. The writ was dismissed.

Such is the case as we extract it from a none too clear record. It thus appears that in passing upon the temporary injunction the supreme court of Illinois sustained it

in part because of allegations of violence and libel. But our concern is with the final decree of the appellate court. On its face the permanent injunction in that decree rested on the explicit avowal that "peaceful persuasion" was forbidden in this case because those who were enjoined were not in Swing's employ. Moreover, as we have seen, the supreme court of Illinois dismissed proceedings before it to review that decree on representations that the decree was in accordance with its mandate on the temporary injunction.

Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye, *Herndon v. Lowry*, 301 U. S. 242, 258; *Schneider v. State*, 308 U. S. 147, 161 [reported in Chapter 2]; *United States v. Carolene Products Co.*, 304 U. S. 144, 152n., it would be improper to dispose of the case otherwise than on the face of the decree, which is the judgment now under review. We are therefore not called upon to consider the applicability of *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, *supra*, the circumstances of which obviously present quite a different situation from the controlling allegations of violence and libel made in the present bill.

All that we have before us, then, is an instance of "peaceful persuasion" disentangled from violence and free from "picketing en masse or otherwise conducted" so as to occasion "imminent and aggravated danger." *Thornhill v. Alabama*, 310 U. S. 88, 105 [reported in Chapter 2]. We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no "peaceful picketing or peaceful persuasion" in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

Such a ban of free communication is inconsistent with the guarantee of free-

dom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American [Steel] Foundries v. Tri-City Council*, 257 U. S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case. "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Senn v. Tile Layers Union*, 301 U. S. 468, 478 [reported above].

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the result.

MR. JUSTICE ROBERTS [dissenting:] I am unable to agree to the court's disposition of this case. I think the writ should be dismissed or the judgment affirmed.

The record presents difficult questions concerning Illinois procedure, as to which the parties are in disagreement, and we ought not to attempt to resolve them.

The respondents filed a complaint in the Circuit Court, on which a temporary injunction issued. The petitioners answered. They also made a motion to dismiss the complaint and that motion was granted, with the result that the temporary injunction was dissolved. On appeal, the appellate court reversed the order dismissing the complaint. From that action an appeal was taken to the Supreme Court of the State, which affirmed the decree of the appellate court. On analysis of the complaint, the Supreme Court found that it charged that no dispute existed between the employer and his employees; that the petitioners had been indulging, and were continuing to indulge, in a series of libels against the respondents; were indulging and were continuing to indulge, in threats and acts of violence. The grounds on which the court sustained the complaint as stating a cause of action in equity are summed up in the conclusion of its opinion thus: "A State or nation ceases to be sovereign if it tolerates within it any force other than its own, and that force must be such as is established by law, directed by the courts, observing the principles of due process and equal protection of the law. To whatever extent these rules are violated we have lawlessness. and under such circumstances a court of equity will not pick and choose among the unlawful acts and threats but will enjoin the whole scheme."

Thereafter the record discloses merely that the cause came on for further hearing in the appellate court. We do not know whether that hearing was upon the bill and answers or upon the complaint and the motion to dismiss, and the parties are in grave dispute on the subject. We do know from the record that the appellate court, after reciting the previous history of the case, including the affirmance

of its judgment by the Supreme Court, and a statement that, under the law of Illinois, peaceful picketing is unlawful when conducted by strangers to the employer, coupled with the further statement that the respondents were entitled "in this case" to relief by injunction against the threat of such peaceful picketing, and that the respondents had maintained their complaint and the equities of the case were with them, the appellate court proceeded to decree "in accordance with the mandate of the Supreme Court of Illinois," that the petitioners should be enjoined from picketing or patrolling respondents' shop, exhibiting signs and placards to persuade persons to refrain from entering the place of business and from acts of violence menacing or coercing persons seeking employment from entering respondents' place of business.

From this final decree the petitioners sued out a writ of error in the Supreme Court of Illinois and the respondents moved to dismiss it for the reason that the order and opinion on the previous appeal "finally settles all the rights of the parties." In the brief filed by the petitioners they stated: "The writ of error is here presented with knowledge that this court has fully settled all issues of the case in a prior review thereof and that the decree entered by the Appellate Court is in compliance with the mandate of this court. . . . If this court adheres to the position in *People v. Militzer*, 301 Ill. 284, page 287, that

issues once decided on review will not be again considered on a second review, a final order in this case may properly dismiss the writ of error on the ground that all issues of the case have been settled on prior appeal and that the decree entered by the Appellate Court is in conformity with the mandate issued to the Appellate Court by this Court."

The Supreme Court of Illinois, without opinion, sustained the motion and dismissed the writ of error. I am unable to say that this action was an affirmance of any recital in the decree of the appellate court respecting the legality of peaceful picketing disconnected with a continued course of publishing libels, making threats, and using force. If the final decree was right on the ground stated by the Supreme Court in sustaining the temporary injunction; and if, under the Illinois practice, the affirmance of such a correct decree based on a previous opinion of the Supreme Court does not amount to the adoption of a preamble or recital of the decree, then we ought not to reverse the final decree of the Supreme Court, which, on the facts stated in the complaint, is correct when tested by the principles enunciated in *Ethyl Gasoline Corporation v. United States*, 309 U. S. 430, 461, and in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, [reported in Chapter I], because of a recital in the decree of the appellate court.

The CHIEF JUSTICE joins in this opinion.

II. "SECONDARY" APPEALS TO CONSUMERS

Unions can appeal to ultimate consumers not only when the employer is a retailer but also whenever the employer deals with retailers. The union puts economic pressure on the retailer by these appeals; its actions may be spoken of as a "secondary boycott," just as are the sympathetic strikes mentioned in the next two sections. This epithet will be applied by judges or others who are about to condemn the practice. We shall see that the New York courts permit secondary appeals

to consumers of the "Don't buy Smith's bread, sold in this store" type and condemn the "Don't buy in this store" type. They are inclined to speak of only the latter group as "secondary."

The boycott method which is most frequent today is "secondary picketing"—the stationing of pickets in front of the retail establishment to warn away customers, in order to get the retailer to stop buying from the recalcitrant company. Earlier boycotts of

this sort relied more on leaflets, "unfair" lists, union labels, speeches in union meetings, and occasional newspaper advertisements. Retailers would be appealed to and told that those devices might cut their trade. Perhaps the later, picketing method seems to judges more illegal, since its reminder to consumers is more immediate and effective. However, there is greater leniency today toward all such consumer boycotts than there was at the time of the *Danbury Hatters Case*; we have already seen some evidence of the new situation in the previous section.

The labor-consumer boycott cases which reached the Supreme Court in the first decades of the century were the *Danbury* case and the *Bucks Stove* case. The former was brought on the theory that, where the manufacturer and the retailers were in different states, the union was restraining interstate commerce unduly and violating the Sherman Act. To bring a test case the American Anti-Boycott Association (now the League for Industrial Rights) helped the Danbury, Connecticut, firm of Loewe and Company to fight up to the high court the matter of the United Hatters' closed-shop drive, begun in 1897. A strike was called at Loewe's in 1902; it was backed up by a boycott. A year later the firm sued for \$88,000 damages, to be tripled under the Sherman law. The union "demurred," but the Supreme Court held in 1908 that there were grounds for suit, pointing to the common-law principle that a combination was illegal if it compelled one not to engage in a trade except under conditions imposed by the combination—a principle which, if literally applied, would ban all strikes.

The case went back for trial. Meanwhile

the Molders Union had been boycotting the Bucks Stove and Range Company, with the help of the A. F. L. It chose the method of injunction instead of damage suit. Since the Sherman Act did not empower it to sue for an injunction, it sued the A. F. L. officials under the common law of the District of Columbia, in 1907. It was successful and, when the officials disregarded the injunction, it brought contempt proceedings. These went forward despite the fact that the company found it advisable to settle its dispute with the union. The contempt case reached the Supreme Court in 1911. The court again affirmed the illegality (even aside from the Sherman Act) of these boycotts. It rejected the union's pleas of "free speech" and "free press," pleas which, the previous chapter has shown, acquired more importance later. However, the Court found that the contempt case was part of the injunction case against the union leaders and had no standing after the company in its settlement agreed to drop the injunction case. The Court indicated that it was also possible to charge the officials not with civil but with criminal contempt against the court which issued the injunction. *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418 (1911). Criminal contempt charges were then brought, but were eventually dismissed by the Supreme Court because they had been brought too long after the offenses were committed.¹

The trial in the *Danbury Hatters Case* having gone against the union, it took the matter to the Supreme Court.

¹ *Gompers v. U. S.*, 233 U. S. 604 (1914). An extended account of the Bucks boycott is given in Harry Laidler, *Boycotts and the Labor Struggle* (New York: John Lane Company, 1913).—C.R.

THE SECOND DANBURY HATTERS DECISION (*Lawlor v. Loewe*)

Supreme Court of the United States. 1915.

235 U. S. 522; 35 Sup. Ct. 170; 59 L. Ed. 341.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action under the act of July 2, 1890, c. 647 §7, 26 Stat. 209, 210, for a combination and conspiracy in restraint of commerce among the States, specifi-

cally directed against the plaintiffs [Loewe and his firm] . . . among others, and effectively carried out with the infliction of great damage. The declaration was held good on demurrer in *Loewe v. Lawlor*, 208 U. S. 274, where it will be found

set forth at length. The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats . . . the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other States and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other States. The case now has been tried, the plaintiffs have got a verdict and the judgment of the District Court has been affirmed by the Circuit Court of Appeals. . . .

The grounds for discussion under the statute that were not cut away by the decision upon the demurrer have been narrowed still further since the trial by the case of *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600. Whatever may be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States.

It requires more than the blindness of justice not to see that many branches of the United Hatters and the Federation of Labor, to both of which the defendants belonged, in pursuance of a plan emanating from headquarters, made use of such lists, and of the primary and secondary

boycott in their effort to subdue the plaintiffs to their demands. The union label was used and a strike of the plaintiffs' employes was ordered and carried out to the same end, and the purpose to break up the plaintiffs' commerce affected the quality of the acts. *Loewe v. Lawlor*, 208 U. S. 274, 299. We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights, and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. It is a tax on credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the 'We don't patronize' or 'Unfair' list were means expected to be employed in the effort to unionize shops. Very possibly they were thought to be lawful. See *Gompers v. United States*, 233 U. S. 604. By the Constitution of the United Hatters the directors are to use 'all the means in their power' to bring shops 'not under our jurisdiction' 'into the trade.' The by-laws provide a separate fund to be kept for strikes, lock-outs, and agitation for the union label. Members are forbidden to sell non-union hats. The Federation of Labor with which the Hatters were affiliated had organization of labor for one of its objects,

helped affiliated unions in trade disputes, and to that end, before the present trouble, had provided in its constitution for prosecuting and had prosecuted many what it called legal boycotts. Their conduct in this and former cases was made public especially among the members in every possible way. . . . If the words of the documents on their face and without explanation did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the States. We think it unnecessary to repeat the evidence of the publicity of this particular struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiffs, did not know what was done in the specific case. If they did not know that, they were bound to know the constitution of their societies and at least well might be found to have known how the words of those constitutions had been construed in the act [that is, had been applied by the union officers]. . . .

*Judgment affirmed.*¹

* * * *

We turn now to the more recent cases, in which the question very usually is whether the "outsider" character of the secondary picketing means that there is no "labor dispute," so that the court may grant an injunction without regard to the anti-injunction law (if there is one). As suggested above, the New York Court of Appeals has compromised on this issue. It says that where the union is attacking a particular product being

retailed, the picketing is permissible. For instance if a certain brand of bread is non-union, the bakers' union may picket a store which sells it with placards asking consumers not to buy that particular brand. It speaks of the manufacturer and the storekeeper as being in the same trade, which brings them under the New York anti-injunction law; it says that they have a "unity of interest." *Goldfinger v. Feintuch*, 276 N. Y. 281 (1937). Of course the tendency of such placards is to keep customers out of the store altogether, but the New York courts will not condemn the placards unless they sweepingly accuse the storekeeper of being "unfair" and imply that the union's dispute is directly with him. This is condemned as illegal misrepresentation, just as it was before the anti-injunction law.

There are many cases arising out of the purchase of non-union electric signs in which pickets are posted who are unable to say "Don't buy such and such a product here," since the electric sign is not for resale. Similarly, newspaper strikers have often picketed stores which advertise in the struck newspaper; in New York City union window-washers have picketed non-union-washed stores and buildings. Usually, though not always, courts have held these practices illegal. The New York Court of Appeals finds that there is here no "unity of interest," *Canepa v. Doe*, 277 N. Y. 52 (1938), so much so that it is disorderly conduct to picket peacefully against a non-union electric sign. *People v. Bellows*, 281 N. Y. 67 (1939).

Similarly the Texas Court of Civil Appeals granted an injunction in *Carpenters v. Ritter's Cafe*, 138 S. W. (2d) 223 (Tex., 1940), where the owner was using non-union labor on a building job a mile away and where both customers and truck drivers refused to pass the picket line. The New Jersey chancery court granted an injunction in *Mitnick v. Furniture Workers*, 124 N. J. Eq. 147, 200 Atl. 533 (1938). The highest New Jersey court affirmed one in a newspaper-advertiser case, *Evening Times v. American Newspaper Guild*, 124 N. J. Eq. 71, 199 Atl. 598 (1938); the federal Supreme Court refused to take the case.

The general lines of decision found in the "outsider" case and in these "secondary" cases will reappear in the next two sections,

¹ The firm collected the damages from the union members, most of it raised by the A. F. L., in 1917. W. G. Merritt, *History of the League for Industrial Rights* (New York: League for Industrial Rights, 1925), pp. 28-29. On this case, see Edward Berman, *Labor and the Sherman Act* (New York: Harper and Brothers, 1930), and Laidler, *op. cit.*—C.R.

in which sympathetic action by other unionists, rather than a response by consumers, is

the means of the union's gaining bargaining strength.

THE MEADOWMOOR DAIRIES, INC. *v.* THE MILK WAGON DRIVERS' UNION

Supreme Court of Illinois. 1939.
371 Ill. 377; 21 N. E. (2d) 308.

In this case the company based its claim to an injunction against all picketing on the fact that the picketing was "secondary picketing," but also on the theory that it was wrong for the union to demand that it stop dealing with its milk-wagon drivers as small contractors or "vendors." We have already seen in Chapter 1, in the same case in the U. S. Supreme Court, that the company based its claim also on the fact that the union's project had been marked by the use of violence, a dispute over the character of which led to majority and minority opinions in the federal high court.

* * * *

MR. JUSTICE GUNN delivered the opinion of the Court.

Appellant [firm], the Meadowmoor Dairies, Inc., filed a bill of complaint in the superior court of Cook County on February 2, 1935, to restrain . . . the Union . . . and the members . . . from interfering . . . with the sale of the appellant's products by picketing stores where its milk was sold or offered for sale, and from using violence . . . in furtherance of an alleged conspiracy to injure the business of appellant, and from interfering with certain individuals, hereafter referred to as vendors, who purchased the milk from the appellant and resold it to stores or individuals. A preliminary injunction was issued but it was later modified to permit peaceful picketing of the appellant's plant. The appellees answered denying the allegations of force, violence and conspiracy, but admitted that they did cause peaceful picketing of certain stores which sold appellant's products, by having individuals carry banners or

placards bearing thereon the words: "This store is unfair to Milk Wagon Drivers' Union, Local 753." The appellees allege they have a right to thus peacefully picket, as they claim terms and conditions of employment are involved as defined in the Anti-Injunction statute of the State of Illinois. . . .

The members of the defendant union are employed upon a weekly basis by dairier competing with the Meadowmoor Company and have certain definite hours of work and deliver the milk, as employees, to customers of their employers. They have certain routes, solicit business and are paid a premium above the fixed minimum of sales. The Meadowmoor company does not follow this system. It sells its milk direct to certain individuals designated in the record as vendors, who own or rent delivery trucks, sell directly to stores and establish routes and sell from house to house and do their own collecting and retain the money so collected. The so-called vendors are not members of the union and do not follow the rules of the union with respect to hours of work or times of delivery, and their compensation depends upon how much milk they are able to sell to the customers they procure.

The appellees claim that disposing of milk in this way is injurious to the members of the union and has caused a number of them to lose employment because the appellant's milk was sold at a lower price than that of their employers. Appellees frankly admit that it is the system of vending or selling milk to purchasers at the plant, who, in turn, resell and deliver,

to which they object. It is claimed this system brings about a situation which causes a dispute concerning terms and conditions of employment, thereby authorizing them to peacefully picket the stores purchasing milk without being restrained by injunction, except for the use of force or violence.

Evidence was heard before a master in chancery who recommended that a permanent injunction be issued against violence, unlawful actions and picketing of any kind. The superior court did not follow the recommendations, in full, but entered a decree enjoining all unlawful acts and acts of violence but permitted the picketing of stores buying appellant's products, and the vendors buying and reselling, by peaceable means including the carrying of the placards and banners above mentioned. From this decree appellant has appealed directly to this court claiming constitutional questions are involved. The appellees, by cross-appeal, claim that an injunction restraining the carrying of banners in a peaceful manner would restrict the right of free speech guaranteed by the Federal and State constitutions. . . .

[The court holds that the Illinois anti-injunction law, unlike recent laws, defines "labor dispute" narrowly and so protects peaceful picketing only when it is carried on by actual employees who are on strike. Not only are the picketers, unionized milk wagon drivers, not employees of the company, but their rivals who deliver Meadowmoor milk are no longer Meadowmoor's employees but have become small contractors. It is in fact this change to which the union objects.]

An illustration of how a change in the system of business may affect employees is presented by the cash-and-carry grocery stores which eliminate delivery of goods altogether and thus affect the employment of delivery drivers of other stores who pursue a different method.

When we remember that the officers of appellees' union testify that their principal objection is to the "vendor system" employed by the appellant and that they had no quarrel concerning the employees in appellant's plant, the claim of appellees would require the application of the Anti-Injunction statute to every change of operation of competing producers, manufacturers or employers, if the effect were to reduce the number of employees, eliminate employees, or to adopt any method that might affect the hiring capacity of their own employers. The history of the labor enactments in this State, and other jurisdictions having similar statutes, indicates the law only applies in cases where the parties to the dispute are either employers hiring labor, or employees hired on a wage basis or its equivalent. Neither the history of labor controversies nor the language of the Anti-Injunction statute nor any other enactment affecting labor, indicates the act was ever intended to apply to cases where the controversy is between the employees who work for wages in performing services, and producers or manufacturers who do not have hired employees, letting that part of the business be performed in an independent manner by contractors, commission men or persons working on a coöperative basis. . . .

. . . The system of selling milk of the appellant is a species of competition with the unionized dairies in the Chicago district. The appellant enjoys a large distribution because of the lower price charged by its vendors for the product sold and delivered. This right is of value to the appellant and is of value to milk purchasers, and the fact that it has a tendency to injure the appellees by depriving them of customers is a result of legitimate competition that is favored by the law. If this competition were stifled by permitting the interference with contracts or purchases by independent purchasers or ultimate consumers going and procuring their own delivery, it would tend to create a monop-

only not only in the companies presently engaged in the delivery of milk, but would stifle competition on the part of the appellant and others who might desire to engage in the business and use a system of delivery different from that of the appellees. . . .

We have, to this point, considered the legal propositions involved upon the facts admitted by the appellees. The facts in the record present a situation stronger than the mere claim of self-protection on the part of the appellees, and the carrying out of peaceful measures to enforce such alleged rights.

The master in chancery made a finding as follows: "That the said defendant Milk Wagon Drivers' Union, Local 753, its officers and members, acting in their several capacities as officers, agents and members of said Union, did enter into an unlawful conspiracy to prevent the sale and delivery of milk from plaintiff's dairy; that such interference with plaintiff's business consisted of intimidation of the customers of plaintiff's vendors, by the commission of the acts of violence heretofore enumerated: that it was part of said conspiracy and activities of said defendants to hinder the storekeepers and other retailers of milk sold by the plaintiff; to prevent them from continuing the business of selling milk of the plaintiff and to cause the customers of the plaintiff's vendors to discontinue the purchase of plaintiff's milk."

The evidence shows that, in addition to picketing the stores handling appellant's milk by men carrying banners bearing the words "unfair to Milk Wagon Drivers' Union," etc., numerous instances of assaults upon the independent vendors occurred; that trucks hauling milk were overturned and damaged; that windows of the stores were broken and stink bombs and explosives thrown in or upon the stores of the distributors of appellant's milk. In several instances it is shown these

unlawful acts were committed by members of defendant union, but it is claimed that these were their personal acts, and not the act of the union or done with the authority of the union. The evidence, however, further discloses that when any of these law breakers were apprehended they were represented by an attorney of the union, their fines were paid out of union funds and damages were paid for destruction of property in like manner, and there is nothing in the record to indicate that any of these offenders were disciplined in any manner by the defendant union. There is some authority for the proposition that such conduct constitutes a ratification by the union of such illegal acts. (*Alaska S. S. Co. v. International Longshoremen's Ass'n*, 236 Fed. 964; *Great Northern Railway Co. v. Local Lodge*, 283 id. 557.) Whether it does or not, picketing by the carrying of a banner, with the words, "unfair," etc., printed thereon, in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that non-compliance would possibly be followed by acts of an unlawful character. Certainly it is not within the power of the retailers to prevent unlawful acts and if the defendant union puts in motion a policy which its members deem to be an invitation or license to injure persons and property, it cannot, in equity, claim that there can be a severance of the lawful acts from the unlawful ones, and thus, by disclaiming an illegal purpose, take advantage of illegal acts. . . .

Appellees have called to the court's attention a number of authorities which, in view of our conclusion that a labor dispute is not involved, have no relevancy here. As supporting the proposition that peaceful picketing is legal and lawful, every case cited on the proposition grew

out of a case between an employer and employee, or involved employees' rights against other employers of labor. None of the cases cited by appellees applies to cases of conspiracy to injure another's business or trade or to induce a breach of a contract to the injury of a third person, or to boycott cases where the plaintiff is attacked through pressure upon his customers, except those cases under the Norris-LaGuardia act, or under statutes peculiar to those States in which the controversy arose. It will be noted that the term "labor dispute," as used in the Norris-LaGuardia act, is much broader and more far-reaching than as used in the Anti-Injunction act. Among other things it contains the following provision: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiations, fixing, maintaining, changing, seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Senn v. Tile Layers' Union, 301 U. S. 486 [reported above], and *American Furniture Co. v. I. B. of T. and H. of A.*, 222 Wis. 338, both involve a statute of Wisconsin similar to the Norris-LaGuardia act, as, also, does *Wallace v. International Ass'n of Mechanics*, 155 Ore. 652, 63 Pac. (2) 1090, a similar statute in Oregon. . . .

Appellees contend that they may not be restrained or enjoined in any case from carrying placards bearing thereon printed words conveying information to the public, because such would violate the guarantee of free speech. In this connection they call our attention to a number of cases which it is claimed sustain their position in this case. *DeJonge v. Oregon*, 299 U. S. 353 [reported in Chapter 2]; involved a direct suppression of public meetings and discussions under the Criminal Syndicalism statute of Oregon. *Lovell v. Griffin*, 303 U. S. 444, involved the

legality of an ordinance prohibiting the distribution of circulars and books inside of a city, without a permit. . . . All of these cases involved legislation attempting to suppress or limit free speech by criminal process or by way of injunction. They did not involve the construction to be given in case of conflicting constitutional rights. As was pointed out above, the appellant has certain rights guaranteed by the constitution and appellees claim that, regardless of those rights, they may do certain acts by reason of a different provision of the constitution. In this respect none of the above cases applies. No case has been cited where this claim by appellees has been applied in boycott cases, or cases involving the breach of constitutional rights, except in those States where boycotts are not illegal and where statutes similar to the Norris-LaGuardia act have been enacted. . . .

In *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, the United States Supreme Court held that a court of equity may enjoin continuance of a boycott, although spoken words or written matter were used as one of the instrumentalities by which the boycott was made effective. On page 439 the court says: "In case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'unfair . . .' or similar expressions, a force not inhering in the words themselves and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. . . ."

In *Truax v. Corrigan* [reported in Chapter 1] . . . , involving a labor dispute, a claim was made by the defendants that they had the right to picket by displaying banners advertising a strike and denouncing the plaintiff, as a means of

advertising the cause of the strike. This claim was rejected by the court. . . .

. . . Enter a permanent injunction as prayed in the bill of complaint. . . .

[FARTHING, J., dissented.]

* * * *

As we saw in Chapter 1, the union asked the federal Supreme Court to reverse this decision, on free speech grounds, and was refused. The federal court found itself in accord with *one* of the reasons why the Illinois court issued a sweeping injunction, namely that relating to violence. It presumably did not agree with the other reasons—objection to the vendor system and to the secondary character of the picketing. Cf. its decision, not long before, in *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U. S. 91 (1940). In that case the company sought an injunction under the anti-trust law against actions similar to those in the *Meadowmoor*

case; it was told that the anti-injunction law prevented. A great many other suits had been brought against the Milk Wagon Drivers locals of the A. F. L. Teamsters union about this time. At about the same time as it decided the *Lake Valley* case the Supreme Court refused to review a decision of the Ohio supreme court denying an injunction in *Ritter v. Milk Drivers*, in which it had been claimed that the closed shop was illegal under the Ohio anti-trust law. Cf. an injunction against another milk drivers union, by the Indiana supreme court, in *Wiest v. Dirks*, 20 N. E. (2d) 969 (1939), where secondary picketing, a closed shop demand, and violence were involved, but no "vendor" arrangement. Cf. another in which the secondary picketing was condemned as keeping out not only consumers but also sympathetic truck drivers delivering other groceries. *Maywood Farms Company v. Milk Wagon Drivers*, 1 Labor Cases 1311 (Ill., App. Ct., 1939).

WILSON & COMPANY v. BIRL

U. S. Circuit Court of Appeals. 1939.
105 Fed. (2d) 948.

BIDDLE, Circuit Judge: This is an appeal from an order of Judge Kirkpatrick denying a temporary injunction against the officers and agents of three labor unions. The question involved is whether the trial judge had power to issue the injunction under the provisions of the Norris-LaGuardia Act.¹

The appellant, Wilson & Co., is engaged in the wholesale meat business, with a plant in Philadelphia, where it processes and stores meat, shipped to it in interstate commerce, and sells twenty-five per cent of its products in interstate commerce. There are three unions involved as defendants. Local 195, the meatcutters, includes all but five of appellant's production and maintenance employees. Local 107, the truckers, has all appellant's truckers; and the members of Local 18571 are the employees of a cold storage warehouse

where appellant stores its products. On December 29, 1938, the meatcutters and truckers struck on account of the employment of the five non-union maintenance men, to force on the employer a closed shop, and have picketed Wilson's plant, and persuaded its customers not to accept deliveries of goods, threatening them with picketing, and in some instances picketing their places of business. It is clear from the record that these activities were the result of a concerted effort of the three unions to bring about a closed shop. Judge Kirkpatrick found that there had been little violence in general, and no evidence that the three or four instances of violence had been ratified. This finding is supported by the record. As a result of the unions' activities appellant's business is virtually at a standstill.

The trial judge also specifically found that appellant had complied with §8 of the Norris-LaGuardia Act requiring that

¹ Quoted in Chapter 1.—C.R.

an employer make every reasonable effort to settle a labor dispute before being entitled to injunctive relief; that, with respect to §7 of the Act, greater injury would be inflicted upon the appellant by the denial of the relief asked for than upon the appellees by granting it; and that the appellant had no adequate remedy at law. Subsection (e) requires a finding that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." As to this Judge Kirkpatrick said: "The picketing of the plaintiff's plant is being carried on under police supervision and control, and the police appear to have supplied protection against injury to physical property." He added that the plaintiff was not protected against loss of business with its customers. But it would be unreasonable to construe the subsection to include losses which the exercise of the powers of the police are hardly calculated to prevent. The words mean that only where the police can't or won't do their job of protecting physical property the court may step in. The act takes this executive function out of the courts, and leaves it to the appropriate executive officer, unless he fails to function. *Heintz Mfg. Co. v. Local No. 515*, 20 F. Supp. 116 (D. C. Pa.).² There is nothing in the record to show that the police did not have the situation under control. On this ground alone the injunction could have been refused. . . .

Section 7 makes one other prerequisite before an injunction can issue—that unlawful acts have been threatened or committed. Appellant argues that the acts of the union are unlawful under Pennsylvania law—striking for a closed shop,

coercion of appellant's customers not to deal with it, the acts of violence (even though none were proved to have been authorized), picketing in greater numbers than calculated merely to publish the existence of the dispute. It is not necessary for us to discuss whether or not Pennsylvania law condemns these activities, although it may be pointed out that the legality of the closed shop is established by statute,³ and the propriety of a strike to enforce it was recently recognized by our court.⁴ For, as pointed out by the court below, §4 of the act enumerates certain acts not subject to injunctive relief. The test is objective; not the purpose or intent of the acts sought to be restrained, and not even their illegality; but whether they come under §4.

This section provides that no United States Court shall have jurisdiction to enter injunctions in labor disputes to prohibit persons from doing "whether singly or in concert" certain specified acts. These acts are classified under nine subsections ((a) to (i) inclusive); but we need consider only those which are applicable to the particular activities in this case. They are:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment." A strike, therefore, cannot be enjoined. Whether or not the strike in this case is illegal, because of its purpose,

² Pennsylvania Labor Relations Act, June 1, 1937, P. L. 1168, 43 P. S. 211.6 (c) ". . . Provided, That nothing in this act, or in any agreement approved or prescribed thereunder, or in any other statute of this Commonwealth, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees, as provided in section seven (a) of this act, in the appropriate collective bargaining unit covered by such agreement when made." This subsection is copied, nearly *verbatim*, from §8 (3) of the National Labor Relations Act [reported in Chapter 5].

⁴ *Apex Hosiery Co. v. Leader*, 90 F. (2d) 155, 160 . . . [Cf. the damage case brought by the Apex company, reported in Chapter 1.]

³ "That Act of Congress was based upon a recognition of the fact that the preservation of order and the protection of property in labor disputes is in the first instance a police problem, belonging to the executive rather than the judicial side of the government, and its whole intent and purpose was to remove the courts from that field, except in cases where the peace authorities failed or refused to act."

as argued by appellant, is therefore beside the point. The test is no longer given the uncertain elasticity of "illegality." The statute, dealing strictly with procedure, nowhere attempts to define as lawful the acts which it says may not be enjoined. The purpose of the act to remove the jurisdiction of courts to enjoin strikes as such is emphasized in §9 which defines the manner in which the court shall make its findings. The injunction "shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint . . . and as shall be expressly included in said findings of fact . . ." A strike is not the type of specific act contemplated by the exception, which looks to a particular action of an individual, whether singly or in concert with another. We are of the opinion that Federal courts may no longer issue general injunctions against striking, but only to restrain specific acts of individuals, which we shall presently discuss.

The picketing here complained of averaged ten to fifteen persons at a time, and on one occasion rose to ninety-seven. The subsections dealing with picketing, found in (e) and (f), are as follows:

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute."

Again, the uncertain test, expressed in the word "lawful" (picketing) is not employed.⁵ If the picketing is peaceful, unaccompanied by acts of violence, irrespective of whether it may be mass picketing, and therefore according to appellant's

argument illegal in Pennsylvania, it cannot be enjoined by a Federal court. Strikes and picketing are general acts, involving concerted efforts; the narrow limit of federal restraining power, under this act, is confined to forbidding defined acts of individuals.

It is true that the picketing ("assembling peaceably") referred to in (f) is "in promotion of their interests in a labor dispute." Obtaining a closed shop is clearly in furtherance of the interests of the strikers—an effective step towards a more cohesive and powerful organization.

Three other subsections of §4 may be considered together:

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this chapter."

The language of these subsections, and of (e), is broad enough to include the other acts of the appellees exerted against the appellant and its customers—following its delivery trucks, and persuading its customers by threats of picketing and actual picketing to reject its goods. Where no violence or fraud is involved a district court is without jurisdiction to enjoin members of a labor union from inducing contractors and owners of buildings not to let subcontracts to members of an employers' association which favored an open shop. *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 [review refused by Supreme Court]. As found by the trial judge, the appellees' acts did not involve fraud or violence. Such pressure on others often loosely termed a "secondary boycott," falls within the sections and cannot be enjoined. Carrying placards stating that Wilson & Co. was unfair to organized la-

⁵ The provisions of the Norris-LaGuardia Act, so far as they are applicable, displace Sec. 20 of the Act of October 15, 1914, known as the Clayton Act [reported in Chapter 1]. The second paragraph of this section in defining acts which shall not be restrained uses the word "lawful" twice, and the word "lawful" three times.

bor may have been misrepresentative. It was not fraudulent.⁶

Moreover, the words "unlawful acts" in Section 7 (a), which must be alleged in the complaint and included in the findings, cannot be read separately from the rest of the section, and assume appropriate meaning only when we consider the section as a whole. Irreparable injury to the complainant's property, which has no police protection, is an essential averment and finding; and the "unlawful acts" do not constitute a general reference to anything that may be considered illegal, but specifically to the acts of violence which the authority of the executive is calculated to control.

When the Sherman Act was amended in 1914 by the Clayton Act, §6 of the latter provided that labor unions should not "be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws";⁷ and §20 regulated the granting of injunctions in cases between employer and employees, and exempted certain acts from restraint. The language would appear to differentiate

labor unions from trade combinations, and to exclude them from the operations of the Act. Yet the decisions have emptied the words of significance other than the affirmation of what the law had been for a long time—that labor unions are not in themselves unlawful.⁸ The act had little effect in narrowing equity jurisdiction in labor disputes.⁹ We believe that the Norris-LaGuardia Act was adopted to prevent a similar construction.¹⁰ The purpose of the Act, to quote the trial judge, was "to take the Federal courts out of the business of granting injunctions in labor disputes, except where violence or fraud are present."

Judgment affirmed.

⁸ *Stephens v. Ohio State Telephone Co.*, 240 Fed. 759.

⁹ *Duplex . . . v. Deering*, 254 U. S. 443. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184. Section 20, said the court, "introduces no new principle into the equity jurisprudence of those (Federal) courts," and "is merely declaratory of what was the best practice always." *Bedford Cut Stone* [case reported below].

¹⁰ *New Negro Alliance v. Grocery Co.*, 303 U. S. 552, 562 [reported above]. "The legislative history of the act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that act."

⁶ *Cinderella Theater Co. v. Sign Writers' Local Union*, 6 F. Supp. 164.

⁷ Reported in Chapter 1.—C.R.

III. SYMPATHETIC UNION ACTIVITIES

Of boycotts which rely not on ultimate consumers but on sympathetic unionists who withdraw their labor from their employers so that these shall in turn withdraw their trade from the recalcitrant company, the most usual is the material boycott or refusal to work on non-union materials or rival-union materials. This is a sort of strike. It is only one degree less severe than a full sympathetic strike, in which sympathetic unionists refuse to do any work, on non-union or union materials, until the employing company has withdrawn its trade from the recalcitrant. Sometimes this last sort of boycott takes the form of refusing to walk through a picket line, and a willingness to refuse to walk through is standard

equipment with union members, so that A. F. L. men often respect even C. I. O. picket lines and vice versa—unless there is rivalry between the two particular unions. Sympathetic striking may be carried to a very high pitch—it may take the form of a general strike of all trades in a town, in support of the demand of some one trade and usually in the attempt to have a showdown on whether unionism is to be accepted by the employers of that town.

Courts which accept consumer boycotts are likely to accept sympathetic boycotts, and the anti-injunction laws were generally written to legitimize both. Courts which accept material boycotts are likely to accept sympathetic

strikes, though Justice Brandeis in his dissent in the *Bedford* case, quoted below, found occasion to try to distinguish the two, as did Justice Bock in the case of *Denver Local v. Perry Truck Lines*, 101 Pac. (2d) 436 (Col., 1940). Courts are rarely called on to pronounce on general strikes; we shall see that other legal methods are usual in general-strike situations.

Sympathetic strikes almost always involve the sympathizers' breaking their collective agreements, since these always contain provisions that there is to be no strike till the agreement expires. We shall see that judges also give weight to the fact that the sympathetically-struck companies may be unable to fulfill their commercial contracts as a result of the strike.

Strikes for the closed shop, treated later, are of the same genus as refusals to handle non-union materials. The difference lies mostly in whether the industry happens to be integrated or not. If it is integrated and one establishment carries on many processes, a strike for a closed shop in the establishment would be the form probably taken by an attempt to unionize those processes. If the processes are performed by a series of firms and establishments, a refusal to work with non-union men engaged in those processes (that is, a strike for the closed shop) would have to take the form of refusing to work with non-union materials, or of a sympathetic strike. Whether the attempt is made to have one unit try to unionize the other in turn depends on whether the unions happen to be integrated into one union or into a co-operating group.

Where rival unions exist, one union may use the materials boycott against the other just as well as against non-union shops, as we shall see in the section on rival unionism.

We have seen above, in Chapter 1, in the *Debs* case, that the Pullman strike of 1894 was condemned partly because it was a sympathetic one, by an industrial union. Various state courts took differing views of the legitimacy of the sympathetic strike and the materials boycott. These two sympathetic actions were often attacked under the Sherman

Act.¹ Unions hoped that suits under the Sherman Act would cease after Congress passed the Clayton Act in 1914 and included several labor clauses, which have been reported in Chapter 1.

These union hopes were to be dashed, for, when sympathetic activity came before the Supreme Court in 1921, in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921), the Court held that the Clayton Act merely restated the best existing judicial practice. In this case the Court upheld an injunction forbidding the union to persuade New York customers not to deal with a Michigan printing-press manufacturer, who at the time was the only non-union one. Its reasons (which are explained in the *Bedford* case, just below) included the argument that the Clayton Act prevented an injunction only where the union had used lawful means; that persuasion was not lawful in this case, since it caused a loss to the company without the New York unionists being able to show a direct interest in the affair to justify their interference. The Court summed up by saying that the act prevented injunctions only in cases "between employer and employees," that this meant "*his* employees," and that "Congress had in mind particular industrial controversies, not a general class war." The union had conspired to restrain interstate commerce.

The materials boycott was also used by anti-unionists, for instance in California, where non-union building companies refused to buy supplies from sellers who also sold to union builders. An indictment was brought against the Industrial Association of San Francisco, but in 1925 the Supreme Court held that the member firms' intent was to regulate building, not interstate commerce, and that there was little evidence that they had actually seriously impeded commerce. *Industrial Association of San Francisco v. U. S.*, 268 U. S. 64, 77 (1925).

In 1927 the Court decided the *Bedford Cut Stone* case, which was much like the *Duplex* case.

¹ Edward Berman, *Labor and the Sherman Act* (New York: Harper and Brothers, 1930), pp. 256-62.—C.R.

BEDFORD CUT STONE COMPANY *v.* JOURNEYMAN STONE CUTTERS' ASSOCIATION

Supreme Court of the United States. 1927.
274 U. S. 37; 47 Sup. Ct. 522; 71 L. Ed. 916.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioners, Bedford Cut Stone Company and 23 others, all, with one or two exceptions, Indiana corporations, are in the business of quarrying or fabricating, or both quarrying and fabricating, Indiana limestone in what is called the Bedford-Bloomington District in the State of Indiana. . . .

. . . The stone sold in interstate commerce comes into competition with other kinds of natural and artificial stone. The principal producers of artificial stone are unionized and are located outside of Indiana. Before 1921, petitioners carried on their work in Indiana under written agreement with the General Union, but since that time they have operated under agreements with unaffiliated unions, with the effect of closing their shops and quarries against the members of the General Union and its locals. Prior to the filing of the bill of complaint, the General Union issued a notice to all its locals and members, directing its members not to work on stone "that has been started—planed, turned, cut, or semi-finished—by men working in opposition to our organization," and setting forth that a convention of the union had determined that "members were to rigidly enforce the rule to keep off all work started by men working in opposition to our organization, with the exception of the work of Shea-Donnelly, which firm holds an injunction against our association." Stone produced by petitioners by labor eligible to membership in respondents' unions was declared "unfair"; and the President of the General Union announced that the rule against handling such stone was to be promptly enforced in every part of the

country. Most of the stone workers employed, outside the State of Indiana, on the buildings where petitioners' product is used, are members of the General Union; and in most of the industrial centers, building construction is on a closed shop union basis.

The rule requiring members to refrain from working on "unfair" stone was persistently adhered to and effectively enforced against petitioners' product, in a large number of cities and in many states. The evidence shows many instances of interference with the use of petitioners' stone by interstate customers, and expressions of apprehension on the part of such customers of labor troubles if they purchased the stone. . . .

The evidence makes plain that neither the General Union nor the locals had any grievance against any of the builders—local purchasers of the stone—or any other local grievance; and that the strikes were ordered and conducted for the sole purpose of preventing the use and, consequently, the sale and shipment in interstate commerce, of petitioners' product, in order, by threatening the loss or serious curtailment of their interstate market, to force petitioners to the alternative of coming to undesired terms with the members of these unions. In 1924, the President of the General Union said:

"The natural stone industry needs all the natural advantages it can possibly get, as there are so many kinds of substitutes to take the natural stone's place in the building material market, that it behooves the natural stone employers to do their utmost to see that no handicap is in its way, and it is a well known fact that when any material is known to have labor grievances, it retards that material in the build-

ing market, as the building public do not want the stigma on their building that it was built by 'unfair labor,' and they are also afraid of stoppage of work and unnecessary disputes while their building is in course of construction, and no one can blame them for that."

In the Colorado inquiry, when the State Industrial Commission was investigating a strike in Denver, a witness testified that the strike order did not make any allowance for stone theretofore ordered. "We were trying to affect the Bedford people through the local man."

"Q. So the only person injured would be your own local man, who is your employer, and your personal friend, is that it?"

"A. In a way. If it was finished that way, he would be the only one hurt. We are not fighting on this Denver man. We are trying to force these people through the other subcontractors all over the country."

"Q. You are trying to force the Bedford to employ members of your union to do this work?"

"A. Yes, sir."

"Q. And irrespective of who it hurts, that is the object?"

"A. That is the object. It is done from our headquarters."

"Q. Mr. Fernald, or anybody else, they have got to get out of the road, that is the object?"

"A. We are trying to gain this point, irrespective of who it hurts." . . .

That the means adopted to bring about the contemplated restraint of commerce operated after physical transportation had ended is immaterial. . . . the local transactions [were] a part of the general plan and purpose to destroy or narrow petitioners' interstate trade. . . .

Respondents' chief contention is that "their sole and only purpose . . . was to unionize the cutters and carvers of stone at the quarries." . . . A restraint of inter-

state commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint. . . .

With a few changes in respect of the product involved, dates, names and incidents, which would have no effect upon the principles established, the opinion in *Duplex Co. v. Deering* [254 U. S. 443] . . . , might serve as an opinion in this case. The object of the boycott there was precisely the same as it is here, and the interferences with interstate commerce, while they were more numerous and more drastic, did not differ in essential character from the interferences here. A short statement of the case will make this clear.

The complainant was a manufacturer of printing presses and conducted its business on the "open shop" policy. There had been an unsuccessful strike to enforce the "closed shop," the eight-hour day and the union scale of wages. The strikers and the local organizations to which they belonged were affiliated with an international association having a membership of more than sixty thousand. They entered into a combination to restrain complainant's interstate trade by means of a "secondary boycott," in pursuance of which complainant's customers in another state were warned not to purchase, install or operate its printing presses and threatened with loss and sympathetic strikes should they do so. The strikers threatened a trucking company with trouble if it should haul the presses; incited employees of the trucking company and other men employed by complainant's customers to strike in order to interfere with the hauling and installation of presses; notified repair shops not to do repair work on the presses; threatened union men with loss of union cards and the blacklist if they assisted in installing the presses; and resorted to other methods of preventing the

sale and delivery of complainant's presses in interstate commerce.

This court held that complainant's business of manufacturing presses and disposing of them in commerce was a property right entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce was necessary for the successful conduct of that business; and that the combination to hinder and obstruct such commerce by the means indicated was in violation of the Sherman Anti-Trust Act, as amended by the Clayton Act. The combination was held to constitute a "secondary boycott," defined as "a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it." Whether either kind of boycott was lawful or unlawful at common law was held to be immaterial, and the distinction between a primary and a secondary boycott was only important to be considered upon the question of the proper construction of the Clayton Act; and, as to that, it was distinctly determined that the Clayton Act was not intended to legalize the secondary boycott.

The court further held (p. 467-468) that by prior decisions of this court, it had been settled that a restraint of interstate commerce produced by peaceable persuasion was as much within the prohibition of the Anti-Trust Act as one accomplished by force or threats of force, and that there was nothing in §20 of the Clayton Act (p. 473 *et seq.*) which modified that rule as applied to the case under review or justified a resort to the secondary boycott. And it was said (p. 477) that the harmful consequences of the opposite

construction, adopted by the court below, were illustrated by that case where an ordinary controversy in a manufacturing establishment, concerning terms and conditions of employment there, had been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them. The conclusion was reached that complainant was entitled to an injunction under the Sherman Act as amended by the Clayton Act, and that it was unnecessary to consider whether a like result would follow under the common law or local statutes. Finally, it is important to note (p. 478) the scope of the injunction which was authorized. Not only were the association and its members to be restrained from interfering with the sale, transportation, or delivery in interstate commerce of the presses, but also from interfering with the "carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, . . . and especially from using any force, threats, command, direction, or even persuasion with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, . . ."

Loewe v. Lawlor [208 U. S. 274, the first *Danbury Hatters* decision, the sequel of which is reported above], also dealt with a secondary boycott. . . .

In *United States v. Brims et al.*, 272 U. S. 549, a criminal case [reported in a later section], this court dealt with a combination of manufacturers, contractors and carpenters in Chicago, having for its object the destruction of the competition of nonunion mills in Wisconsin and elsewhere by the employment in Chicago of union carpenters only, with the understanding that they would refuse to install

nonunion-made millwork. There was evidence tending to show that so-called outside competition was cut down and thereby interstate commerce directly and materially impeded, and that this result was within the intention of the combination, which, upon these facts, was held to be in violation of the Anti-Trust Act.

In *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 438-439, this court said that the restraining powers of the courts extend to every device whereby commerce is illegally restrained. . . .

In cases arising outside the Anti-Trust Act, involving strikes like those here under review against so-called unfair products, there is a sharp conflict of opinion. . . .

But with this conflict we have no concern in the present case. The question which it involves was presented and considered in the *Duplex Co.* case, *supra*, as the prevailing and the dissenting opinions show; and there it was plainly held that the point had no bearing upon the enforcement of the Anti-Trust Act, and that since complainant had a clear right to an injunction under that Act as amended by the Clayton Act, it was "unnecessary to consider whether a like result would follow under the common law or local statutes."

Whatever may be said as to the motives of the respondents or their general right to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organizations, the present combination deliberately adopted a course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country, to the gravely probable disadvantage of producers, purchasers and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the

Anti-Trust Act as interpreted by this court. An act which lawfully might be done by one, may when done by many acting in concert take on the form of a conspiracy and become a public wrong, and may be prohibited if the result be hurtful to the public or to individuals against whom such concerted action is directed . . .

. . . That the organizations, in general purpose and in and of themselves, were lawful and that the ultimate result aimed at may not have been illegal in itself, are beside the point. Where the means adopted are unlawful, the innocent general character of the organizations adopting them or the lawfulness of the ultimate end sought to be attained, cannot serve as a justification.

[MR. JUSTICE SANFORD concurred, saying that the point had been settled in the *Duplex* decision. So did MR. JUSTICE STONE, who, however, reminded that he disagreed with that decision.]

MR. JUSTICE BRANDEIS, dissenting.

The constitution of the Journeymen Stone Cutters' Association provides: "No member of this Association shall cut, carve or fit any material that has been cut by men working in opposition to this Association." For many years, the plaintiffs had contracts with the Association under which its members were employed at their several quarries and works. In 1921, the plaintiffs refused to renew the contracts because certain rules or conditions proposed by the Journeymen were unacceptable. Then came a strike. It was followed by a lockout, the organization by the plaintiffs of a so-called independent union, and the establishment of it at their plants. Repeated efforts to adjust the controversy proved futile. Finally, the Association urged its members working on buildings in other States to observe the above provision of its constitution. Its position was "that if employers will not employ our

members in one place, we will decline to work for them in another, or to finish any work that has been started or partly completed by men these employers are using to combat our organization."

The trial court dismissed the bill. The United States Circuit Court of Appeals affirming the decree said:

"After long negotiations and failure to reach a new working agreement, the union officers ordered that none of its members should further cut stone which had been partly cut by non-union labor, with the result that on certain jobs in different states stone cutters, who were members of the union, declined to do further cutting upon such stone. Where, as in some cases, there were few or no local stone cutters except such as belonged to the union, the completion of the buildings was more or less hindered by the order, the manifest object of which was to induce appellants to make a contract with the union for employment of only union stonecutters in the Indiana limestone district. It does not appear that the quarrying of stone, or sawing it into blocks, or the transportation of it, or setting it in buildings, or any other building operation, was sought to be interfered with, and no actual or threatened violence appears, no picketing, no boycott, and nothing of that character."

If, in the struggle for existence, individual workmen may, under any circumstances, co-operate in this way for self-protection even though the interstate trade of another is thereby restrained, the lower courts were clearly right in denying the injunction sought by plaintiffs. I have no occasion to consider whether the restraint, which was applied wholly intrastate, became in its operation a direct restraint upon interstate commerce. For it has long been settled that only unreasonable restraints are prohibited by the Sherman Law. . . . And the restraint imposed was, in my opinion, a reasonable one. The Act does not establish the stand-

ard of reasonableness. What is reasonable must be determined by the application of principles of the common law, as administered in federal courts unaffected by state legislation or decisions. Compare *Duplex Printing Co. v. Deering*, 254 U. S. 443, 466. Tested by these principles, the propriety of the unions' conduct can hardly be doubted by one who believes in the organization of labor.

Neither the individual stonecutters, nor the unions had any contract with any of the plaintiffs or with any of their customers. So far as concerned the plaintiffs and their customers, the individual stonecutters were free either to work or to abstain from working on stone which had been cut at the quarries by members of the employers' union. So far as concerned the Association, the individual stonecutter was not free. He had agreed, when he became a member, that he would not work on stone "cut by men working in opposition to" the Association. It was in duty bound to urge upon its members observance of the obligation assumed. These cut stone companies, who alone are seeking relief, were its declared enemies. They were seeking to destroy it. And the danger was great.

The plaintiffs are not weak employers opposed by a mighty union. They have large financial resources. Together, they ship 70 per cent of all the cut stone in the country. They are not isolated concerns. They had combined in a local employers' organization. And their organization is affiliated with the national employers' organization, called "International Cut Stone & Quarrymen's Association." Standing alone, each of the 150 Journeymen's locals is weak. The average number of members in a local union is only 33. The locals are widely scattered throughout the country. Strong employers could destroy a local "by importing scabs" from other cities. And many of the builders by whom the stonecutters were employed in different cities, are strong. It is only through

combining the 5,000 organized stonecutters in a national union, and developing loyalty to it, that the individual stonecutter anywhere can protect his own job.

The manner in which these individual stonecutters exercised their asserted right to perform their union duty by refusing to finish stone "cut by men working in opposition to" the Association was confessedly legal. They were innocent alike of trespass and of breach of contract. They did not picket. They refrained from violence, intimidation, fraud and threats. They refrained from obstructing otherwise either the plaintiffs or their customers in attempts to secure other help. They did not plan a boycott against any of the plaintiffs or against builders who used the plaintiffs' product. On the contrary, they expressed entire willingness to cut and finish anywhere any stone quarried by any of the plaintiffs, except such stone as had been partially "cut by men working in opposition to" the Association. A large part of the plaintiffs' product consisting of blocks, slabs and sawed work was not affected by the order of the union officials. The individual stonecutter was thus clearly innocent of wrongdoing, unless it was illegal for him to agree with his fellow craftsmen to refrain from working on the "scab"-cut stone because it was an article of interstate commerce.

The manner in which the Journeymen's unions acted was also clearly legal. The combination complained of is the cooperation of persons wholly of the same craft, united in a national union, solely for self-protection. No outsider—be he quarrier, dealer, builder or laborer—was a party to the combination. No purpose was to be subserved except to promote the trade interests of members of the Journeymen's Association. There was no attempt by the unions to boycott the plaintiffs. There was no attempt to seek the aid of members of any other craft, by a sympathetic strike or otherwise. The contest was not a class struggle. It was a struggle be-

tween particular employers and their employees. But the controversy out of which it arose, related, not to specific grievances, but to fundamental matters of union policy of general application throughout the country. The national Association had the duty to determine, so far as its members were concerned, what that policy should be. It deemed the maintenance of that policy a matter of vital interest to each member of the union. The duty rested upon it to enforce its policy by all legitimate means. The Association, its locals and officers were clearly innocent of wrong doing, unless Congress has declared that for union officials to urge members to refrain from working on stone "cut by men working in opposition" to it is necessarily illegal if thereby the interstate trade of another is restrained.

The contention that earlier decisions of this Court compel the conclusion that it is illegal seems to me unfounded. The cases may support the claim that, by such local abstention from work, interstate trade is restrained. But examination of the facts in those cases makes clear that they have no tendency whatsoever to establish that the restraint imposed by the unions in the case at bar is unreasonable. The difference between the simple refraining from work practiced here, and the conduct held unreasonable in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, appears from a recital in that opinion of the defendants' acts:

"The acts embraced the following, with others: warning customers that it would be better for them not to purchase, or having purchased not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; noti-

fyng repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being blacklisted as 'scabs' if they assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, handling, or installing the presses." (pp. 463-4.) . . .

The difference between the facts here involved and those in the *Duplex* case does not lie only in the character of the acts complained of. It lies also in the occasion and purpose of the action taken and in the scope of the combination. The combination there condemned was not, as here, the co-operation for self-protection only of men in a single craft. It was an effort to win by invoking the aid of others, both organized and unorganized, not concerned in the trade dispute. The conduct there condemned was not, as here, a mere refusal to finish particular work begun "by men working in opposition to" the union. It was the institution of a general boycott, not only of the business of the employer, but of the businesses of all who should participate in the marketing, installation or exhibition of its product. The conduct there condemned was not, as here, action taken for self-protection against an opposing union installed by employers to destroy the regular union with which they long had had contracts. The action in the *Duplex* case was taken in an effort to unionize an open shop. Moreover, there the combination of defendants was aggressive action directed against an isolated employer. Here it is defensive action of workingmen directed against a combination of employers. The serious question on which the Court divided in the *Duplex* case was not whether the restraint imposed was reasonable. It was whether the Clayton Act had forbidden federal courts

to issue an injunction in that class of cases. See p. 464.

In *Loewe v. Lawlor*, 208 U. S. 274; *Gompers v. Bucks Stove Co.*, 221 U. S. 418; and *Lawlor v. Loewe*, 235 U. S. 522 [reported above], the conduct held unreasonable was not, as here, a refusal to finish a product partly made by members of an opposing union. It was invoking the power of the consumer as a weapon of offensive warfare. There, a general boycott was declared of the manufacturer's product. And the boycott was extended to the businesses of both wholesalers and retailers who might aid in the marketing of the manufacturer's product. Moreover, the boycott was to be effected, not by the co-operation merely of the few members of the craft directly and vitally interested in the trade-dispute, but by the aid of the vast forces of organized labor affiliated with them through the American Federation of Labor.

In *United States v. Brims*, 272 U. S. 549 [reported below], the combination complained of was not the co-operation merely of workingmen of the same craft. It was a combination of manufacturers of mill-work in Chicago, with building contractors who cause such work to be installed, and the unions whose members are to be employed. Moreover the purpose of the combination was not primarily to further the interests of the union carpenters. The immediate purpose was to suppress competition with the Chicago manufacturers. As this Court said:

"The respondent manufacturers found their business seriously impeded by the competition of material made by non-union mills located outside of Illinois. . . . They wished to eliminate the competition of Wisconsin and other nonunion mills which were paying lower wages and consequently could undersell them. . . . The local manufacturers, relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local

contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination." . . .

Members of the Journeymen Stone Cutters' Association could not work anywhere on stone which has been cut at the quarries by "men working in opposition" to it, without aiding and abetting the enemy. Observance by each member of the provision of their constitution which forbids such action was essential to his own self-protection. It was demanded of each by loyalty to the organization and to his fellows. If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds of involuntary servitude. The Sherman Law was held in *United States v. United States Steel Corporation*, 251 U. S. 417, to permit capitalists to combine in a single corporation 50 per cent of the steel industry of the United States dominating the trade through its vast resources. The Sherman Law was held in *United States v. United Shoe Machinery Co.*, 247 U. S.

32, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to co-operate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so.

MR. JUSTICE HOLMES concurs in this opinion.

* * * *

The *Bedford* decision heightened the A. F. L.'s agitation for a federal anti-injunction law, which led to the Norris-LaGuardia Act of 1932 (printed in Chapter 1), an act which seemed clearly to prevent injunctions against boycotting (partly by omitting the qualifying word "lawfully," as we saw in *Wilson & Company v. Birl*, quoted in the previous section). The act did not forbid damage suits, but these were too cumbersome to be brought frequently and in any case the trend was toward holding boycotts generally lawful.

THE SAN FRANCISCO GENERAL STRIKE

The San Francisco waterfront has been a battle ground of unionism since the days of '49. In 1901, following a long and bitter struggle, the Stevedores' Union was firmly established, but a disastrous strike in 1919 ended with the establishment of open shop conditions. After the passage of the N. I. R. A., the International Longshoremen's Association again organized a local in San Francisco, and the men flocked into it.

A threatened strike of the San Francisco longshoremen in March, 1934, was averted by a special mediation commission appointed by the President. After a truce

lasting seven weeks, the employers flatly refused to recognize the I. L. A. as the representative of the workers, and 2,000 longshoremen struck on May 9. The objectives of the strike were control of the hiring halls, a 30-hour week, a basic wage of one dollar an hour, and union recognition. Control of the hiring halls, to which the stevedores went daily in search of employment, became the crucial issue. So long as the employers retained control, union workers could easily be discriminated against, and the stevedores would have to lose a great deal of time remaining in the halls. The union instead proposed that the employers notify it of the number of jobs open. It could then supply the de-

¹ Maurice Goldbloom and others, *Strikes under the New Deal* (New York: League for Industrial Democracy, 1935), pp. 46-52.—C.R.

sired number of men, dividing the work evenly, and eliminating those from outside the industry. . . .

The strike was marked by violent outbreaks from the beginning. The employers hired strike-breakers, and the strikers, ignoring an anti-picketing ordinance, threw a picket line around the waterfront. On May 12 the police attempted to drive the pickets away, and in the ensuing clash six police and three strikers were injured. The stopping of peaceful picketing by the police aroused the sympathy of all labor, and within four days 27,000 maritime workers were on strike. The teamsters, engaging in their first strike since 1901, refused to move goods from the wharves, and the entire shipping industry of the Pacific Coast was soon at a standstill. So serious was the situation that Governor Rolph asked President Roosevelt to intervene. . . .

. . . President Roosevelt appointed the National Longshoremen's Board, composed of Archbishop Edward J. Hanna; O. K. Cushing, an attorney; and Assistant Secretary of Labor Edward McGrady. The board made a study of the situation and proposed arbitration of all points at issue, but the longshoremen refused to submit the control of hiring halls to arbitration.

On July 3 the Industrial Association attempted to open the port, using trucks protected by the police in an effort to move goods from the piers. The strikers answered with picket lines, and a series of battles between the pickets and the police raged all day.² Much of the fighting centered about the Embarcadero, where the state-owned Railway Belt Line moved freight cars until the pickets forced the suspension of operations. Two strikers

were killed in the bitter fighting, and about 100 were injured. At midnight the state militia arrived. On the following day the central labor body, after protesting the presence of the troops, appointed a Strike Strategy Committee to advise and guide the labor movement of the city. When the funeral for the two slain strikers was held, a procession of 10,000 workers, forming a line a mile long, marched solemnly through the streets of San Francisco.

Dominated by conservatives, the Strike Strategy Committee hedged on the question of a general strike, urging the workers to submit their grievances to arbitration. A general strike, it should be pointed out, could be called only in an indirect fashion, for the constitution of the A. F. of L. forbids a central labor body to call any union on strike, or even to take a strike vote. Samuel S. White, who was active in the strike leadership, described the procedure as follows: "The Strike Strategy Committee called a special meeting of all labor unions Friday afternoon, July 13, to hear its report. At this meeting it was decided to convene a general strike committee on Saturday, to which all unions affiliated with the central labor council were invited to send five delegates. The general strike committee organized and debated the question of asking all unions which had placed themselves at the disposal of the Strike Strategy Committee to walk out Monday morning at 8 A. M. There was no authority to call out unions which had not themselves voted for a general strike."

Meanwhile the strike was spreading. On July 12 the teamsters extended their strike throughout the entire city. Two days later 5,000 butchers and laundry workers stopped work; on the following day 6,000 waiters joined the strike ranks, and the Market Street Railway was forced to suspend operations. It was the predecessor of this road, the notorious United Railways, that had sent Mooney and Billings to prison. Before the general strike

² In an earlier chapter a quotation from George P. Hedley on "Events of the San Francisco Longshore Strike" indicated that the police were the aggressors on July 3, 1934, and the next few days. Their aggression was directed against strikers who had stopped the shipping in part by violent means.—C.R.

started, therefore, the strike of 2,000 longshoremen had grown until 36,000 workers were out.

Impressed by this demonstration, and yielding to pressure from other unions, the Strike Strategy Committee on Saturday, July 14, called a general strike to begin the following Monday at 8 A. M. . . .

An executive committee headed by Edward Vandeleur and George Kidwell, both members of the conservative group, was appointed to conduct the strike. The committee's first act was to issue a statement to Mayor Rossi regretting that labor's proposed action had become known as a general strike. For a "general strike means paralysis of the means of production and distribution of the goods and services necessary to the continued life of any community, thus leading to a breakdown and overthrow of the existing government," and the labor movement of San Francisco had no such intention. The committee guaranteed to keep order, and promised that no one would suffer actual privation. It apologized to those employers who were fair-minded and who had to suffer for others' sins, but knew they would understand that the action had been undertaken to promote the greatest good of the greatest number.

On Monday morning 127,000 workers in the San Francisco Bay region failed to report for work. The strike was virtually complete for a few hours, until the executive committee decided which services were to be provided. The committee met at ten o'clock Monday morning and appointed a permit committee to arrange for necessary supplies, a strike peace committee to assist in preserving order, a publicity committee, and a transportation committee for transfer of food. In order to provide for essential social services, 19 union restaurants were authorized to remain open; truck garden produce and fresh meat were to be available; bakery, milk, and ice wagon drivers were instructed to continue deliveries; gasoline

was sold to doctors; telephone, light, and gas were assured the public; and necessary municipal departments such as police, fire, water, and health were permitted to continue functioning.

While the strike leaders were making these arrangements, Mayor Rossi and the employers were also busy. The mayor assigned 5,000 police to strike duty, and authorized the Police Department to mobilize veterans and college boys as special police. He appointed an emergency committee of "Five Hundred Citizens in Support of Constitutional Authority," whose only action during the strike was to urge the chain stores to stay open, promising them protection. Employers wired the Bergoff Detective Agency in New York for strike-breakers, and received them by plane from Chicago at the rate of 100 a day. The National Guard forces were increased to 4,000, tanks and machine guns were set up on the water front, and the mayor threatened to declare martial law if the strike were not called off immediately.

The federal government's representative and conciliator, General Johnson, arrived Monday night. His first conferences convinced him that the longshoremen's request for complete control of the hiring-halls was just and reasonable, and he was ready to insist that the employers grant the request. After talking to representatives of business and the press, however, he reversed his position on the ground that such action would constitute a "compromise with revolution," particularly as the conservative labor leaders had been "stampeded by communists."

The first action of the strike committee, when it assembled on Tuesday morning, was to increase the number of restaurants allowed to remain open. The next problem was that of the municipal railwaymen, who were threatened with loss of civil service and pension rights. The strike committee decided to allow them to go back to work, since they had voted unan-

imously to strike in support of the longshoremen, though by striking they could win no immediate gains for themselves. George Kidwell then introduced, on his own initiative, a resolution requesting employers and workers to submit to arbitration. This proposal was debated all day, the radical wing bitterly opposing it on the ground that the general strike had been called to support the longshoremen's refusal to arbitrate. Nevertheless the resolution was finally carried by a narrow margin.

During the first day the public generally sympathized with the strike and rather enjoyed the novelty and excitement. The newspapers, however, were encouraged by the mayor and the business interests to print stories of the danger of revolution and of a red reign of terror. The papers were able to appear because the printers, whose wages were raised as soon as the strike threatened, remained at work. Not one paper was friendly, and the bitter opposition of the press soon changed large sections of public opinion. Food trucks were escorted into the city by armed guards, 200 men were arrested by the police in the strikers' headquarters, and the employers demanded martial law.

Wednesday saw the end of the effectiveness of the strike. The strike committee lifted all restrictions on food and gasoline, and all restaurants were allowed to open. The employers, feeling that now they had the upper hand, rejected the proposal to arbitrate. Instead they organized an anti-labor movement, which they asserted would drive out the unions within five years. Three hundred additional arrests were made by the police. William Green, head of the A. F. of L., assured the public that the strike was neither "ordered nor authorized by the A. F. of L.," and that it was purely a local affair, "possessing no national significance." At the same time, General Johnson was asserting on the campus of the University of California that the "bloody insurrection" in San

Francisco was caused by dangerous radicals, and urging responsible labor to "run these subversive influences out from its ranks like rats."

On Thursday, July 19, the strike committee, by a vote of 191 to 174, declared the general strike at an end. In its published resolution, the committee asserted that threats of martial law were responsible for the decision. Such threats had been continuous since the beginning of the strike, however, and both the mediation board and General Johnson were opposed to such action. The statement went on to say that labor had demonstrated its solidarity, and that therefore it would now be perfectly safe for the I. L. A. to submit to arbitration. The longshoremen were not so confident, and voted to continue their strike. The maritime workers, the teamsters, and the Market Street railwaymen, all of whom had difficulties of their own to settle, likewise remained on strike.

Although the general strike had ended, the violence had just begun. Stirred by General Johnson's speech and by the unjustified assertions of communists that their party was directing the strike, Mayor Rossi promised to drive every agitator out of San Francisco. He appealed to Secretary of Labor Perkins for authority to deport any aliens found to be involved in radical activities, and was assured of full cooperation in carrying out the deportation laws. The police and vigilantes had been carrying on raids all during the strike, but this was a signal to give full rein to their fury. All over California there were attacks upon those known to be connected with the radical movement. In San Francisco the work of the vigilantes consisted largely in destroying property. "They wrecked one hall with axes and seized literature and records," the *New York Times* reported. At the office of the *Western Worker*, "the raiders pulled up in five automobiles, threw rocks through the windows and smashed up all the office equipment." On these expedi-

tions the vigilantes were followed by the police, who arrested the victims of the raid.

The manner in which radicals were driven out of the surrounding agricultural districts was thus described by the *San Jose Mercury Herald*: "Armed with bright new pick handles, their faces grim, eyes shining with steady purpose, a large band of vigilantes composed of irate citizens, including many war veterans, smashed their way into three communist hot-spots here last night, seized a mass of red literature and severely beat nine asserter radicals." The paper in an editorial commended the action, and urged the vigilantes to continue until the state was "purged of these criminals."

Senator Wagner and Postmaster General Farley arrived in San Francisco on July 21 to arrange arbitration of the issues involved in the I. L. A. strike. Farley had been authorized to cancel mail contracts if the shipping interest did not agree. The teamsters returned to work on July 21, and the Market Street railwaymen on July 27. Four days later the I. L. A. agreed to the arbitration of all disputed points. It was not until October 12 that the National Longshoremen's Board finally published its report. The terms it established included an hourly wage of 95 cents, a 30-hour working week, and joint control of the hiring halls by workers and employers. . . .

San Francisco taught the labor move-

ment a lesson both as to the dangers and the potentialities of the general strike. It showed that an effort of such magnitude cannot be undertaken without adequate preparation, and that it must have capable leaders and a loyal, class conscious membership. It indicated that, though the intention may be merely economic pressure, by its nature the general strike is a challenge to political authority. It demonstrated the danger that, after the first couple of days, the strike might begin to break down of its own weight. It suggested that, where no revolutionary intent exists, it may be wiser to call merely a general stoppage for a day or two. . . .

* * * *

On general strikes, see Wilfred H. Crook, *The General Strike: A Study of Labor's Tragic Weapon in Theory and Practice* (Chapel Hill: University of North Carolina Press, 1931). Chapter 15 deals with American countries. See also Selig Perlman and Philip Taft, *History of Labor in the United States*, Vol. 4 (New York: The Macmillan Company, 1935), pp. 345-46 (Philadelphia general strike in sympathy with streetcar workers), p. 351 (New York City attempt at a general strike in sympathy with streetcar workers), and pp. 439-43 (Seattle general strike in sympathy with metalworkers and Winnipeg general strike in sympathy with metal and building-trades workers).

On the San Francisco general strike, see also Samuel Yellen, *American Labor Struggles* (New York: Harcourt Brace and Company, 1936), Chapter 10.

PACIFIC AMERICAN SHIPOWNERS v. MARITIME FEDERATION OF THE PACIFIC

United States District Court (W. D., Wash., No. Div.). 1939.
1 Labor Cases 1013.

CUSHMAN, D. J.: This matter having come on for hearing at 2:00 P. M. on April 20, 1939 . . . and notice of said hearing having been duly served upon the defendants, Maritime Federation of the Pacific Coast, Washington District Council No.

1, an unincorporated association, and A. E. Harding, . . . and it appearing . . . that the plaintiff Steamship Companies are engaged as common carriers in transporting freight, passengers and United States Mail by vessels between ports and

places in the Territory of Alaska, and that the defendants have entered into an unlawful combination and conspiracy to compel the said Steamship Companies, and each of them, to surrender rights guaranteed to them in and by the terms of collective bargaining agreements with their employees by dissuading and preventing employees of said Steamship Companies from performing work on the vessels of said Steamship Companies and at the docks or terminals where said vessels load or discharge cargo, and to prevent said Steamship Companies, and each of them, from loading, transporting and discharging lawful merchandise, to-wit, cannery supplies and equipment, and other cargo tendered to them for transportation from ports and places on Puget Sound to ports and places in the Territory of Alaska, and in appearing that on April 15, 1939 the plaintiff Alaska Transportation Company scheduled its *S. S. Tongass* for a voyage from Pier 7 in the port of Seattle, Washington, to ports and places in the territory of Alaska, the vessel being scheduled to sail and sailing at 6:00 A. M. on said date, having on board for discharge at ports and places in Alaska, among other cargo, the following cannery supplies and equipment, to-wit:

	Weight (Lbs.)	Feet
1 Crated Cr-Can Seamer Machine Ser. No. 1457 Compl. . .	4,500	134
2000 Cartons No. 1 Tall Semi-Formed Cans	102,500	2667
600 Cartons No. 1 Tall Can Tops, Plain	42,600	800

shipped by Continental Can Company, Inc., at Seattle, Washington, and consigned to Balcom-Payne Fisheries, Inc. at Ketchikan, Alaska, for which said cargo said plaintiff duly issued to Continental Can Company, Inc. its bill of lading for said transportation and that said vessel arrived at Ketchikan, Alaska, at or about 8:00 A. M. on April 18, 1939, and that longshoremen were ordered by said plaintiff

to report for duty at the dock of Balcom-Payne Fisheries, Inc. for the purpose of taking the lines of and tying said vessel to the dock and thereafter to discharge said cargo, and that as said vessel proceeded to said dock at or about 7:00 P. M. on said date, she was met by a small fishing boat bearing a banner on the bow marked "Maritime Patrol" and a banner on the stern stating "Balcom & Payne Canned Salmon Industry Unfair to Organized Labor" and that said vessel was unable to land and tie up at said dock because the longshoremen who had been ordered as aforesaid refused to go through a picket line which had been established on the street at the entrance to the cannery on shore, resulting in preventing the said vessel from tying up to said dock and discharging her said cargo, and the vessel then proceeded on her northbound voyage with said cargo still aboard, and that said vessel will return on its southbound voyage to Ketchikan, Alaska, on or about Monday, April 24, 1939, and it further appearing that said picketing was the result of instructions given by the defendants and that all of the foregoing is in violation of the Anti-Trust Laws of the United States, commonly referred to as the Sherman Anti-Trust Act and Clayton Anti-Trust Act and that irreparable loss and damage has resulted to the plaintiffs, and each of them, and will continue to result to the plaintiffs, and each of them, if such unlawful acts are continued, and it further appearing that cause exists for the granting of the relief herein provided, and it further appearing that no labor dispute exists between the plaintiffs, or any of them, and the defendants, or any of them, nor any dispute between the plaintiffs and any of their employees regarding wages, hours, working conditions or other terms of employment, or the agency for collective bargaining of any employees of the plaintiffs, or any of them, now, therefore, it is *ordered, adjudged and decreed* that the defendants, and each of them,

and all persons that are now or may hereafter be engaged by them and all of their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them be and they are hereby restrained and enjoined from (1) preventing or attempting to prevent or encouraging anyone else in preventing the discharge of said cargo of cannery supplies and equipment hereinabove described from the *S. S. Tongass* at the dock of Balcom-Payne Fisheries, Inc. at Ketchikan, Alaska, or any other dock thereat; (2) establishing or maintaining or causing to be established or maintained or in any manner encouraging, aiding or abetting in the establishment or maintenance of pickets or picket lines at or near any dock or terminal at Ketchikan, Alaska, where the *S. S. Tongass* may be, for the purpose of preventing the discharge of said cargo; (3) preventing or attempting to prevent or dissuading or attempting to dissuade the members of any of the unions or labor organizations named as defendants herein, or the mem-

bers of any other union or labor organization, or anyone else whatsoever from working in or about said *S. S. Tongass*, or upon any dock or terminal at which said vessel may be, for the purpose of preventing the discharging of said cargo; (4) from declaring, instigating, aiding, abetting . . . any union . . . to declare, institute, or maintain any strikes . . . or other collective action interfering with . . . the discharge of said cargo. . . .

It is further ordered, adjudged and decreed that the defendants, and each of them, immediately revoke any and all instructions . . . made for the purpose of preventing the discharge of said cargo. . . .

It is further ordered, adjudged and decreed that the plaintiffs have given security as provided by Rule 65 of the Federal Rules of Civil Procedure in the penal sum of \$1,500.00, which said security is hereby approved. . . .¹

¹ See a similar decision in *Waterfront Employers of Portland v. C. I. O.*, 1 Labor Cases 386 (U. S. D. C., D. Ore., 1938).

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OPERA ON TOUR, INC. *v.* WEBER

New York Supreme Court (Appellate Division, First Dep't). 1940.
258 App. Div. 516; 17 N. Y. Supp. (2d) 144.

Opera On Tour proposed to give opera inexpensively throughout the United States, using phonograph records instead of an orchestra. It was to use stage scenery, actors, and some choral singers. The musicians' union, through their then president, Weber, protested and got the stagehands' union to declare that it would not work with this opera company as long as it did not employ musicians. The enterprise sought an injunction.

* * * *

To prevent unemployment is a legitimate labor objective, and the right to use every lawful and orderly means by concerted as well as individual action to carry out any legitimate labor objective is the

privilege of workingmen. This right should be entitled to the same protection as is the right of an employer to use machinery for the purpose of making a profit. Our courts recognize that the economic conflict has two sides, both of which are entitled to consideration and protection.

It is contended by plaintiff that the objection to the use of machinery is an attempt to arrest progress. While many may deem this true, there are those who question the fact that we "progress" where we use machinery to such an extent that we destroy the opportunity for men to live by employment and thus create vast numbers of permanently unemployed. In any

event we see no reason why it is not a legitimate object of workmen to attempt by lawful means to limit such alleged "progress" when it results in direct injury to them.

Economic pressure may eventually compel the acceptance of mechanical changes, but there seems to be no legal reason why those who may be injuriously affected thereby may not meanwhile make lawful and orderly efforts to prevent or lessen the extent of the injury to themselves. It is well known that employers do not always use the latest technological improvements where such improvements might lessen their opportunity for profits or destroy large capital investments; and no one claims that they owe anyone a legal duty to do so.

In the present case the product of the machine is but a duplication of the work of "live" musicians. There is no contention by the plaintiff that original music produced by "live" musicians of equal skill may not be obtained and would not be as acceptable to the public. The object of the plaintiff in using mechanically reproduced music is to reduce the cost of its production. It seems no more unlawful for defendants' members to wish to work than it is for the plaintiff's stockholders to wish to make a profit. We think that the law should not take sides one way or the other in such a conflict, so long as lawful and orderly means are employed by those concerned in it. . . .

[May the stagehands help the musicians by carrying on the boycott?] The economic welfare of both unions is closely related to the theatrical profession. The limit placed on union activity is said to be that it "cannot . . . extend beyond a point where its . . . direct interests cease" (*Bossert v. Dhuy*, 221 N. Y. 342, at p. 365). "Direct interests" include those of neutrals who are within the same industry. It has been held as to those outside a shop that they may have the right of self-interest in

procuring unionization of the shop; and that there is too intimate a relation between unionization and economic betterment for the law to deny. . . .

Under the rule enunciated in the decisions of the highest court of this State, a strike may be used in a proper case to bring pressure on those having a unity of interest to conform to the ideals of union labor. Logically, therefore, there can be no reason why those in the same industry may not voluntarily strike to aid one another in support of legitimate labor objectives. Nor does the unity of interest on the part of the stagehands depend solely on the fact that they are engaged in the same industry. They have a direct and vital interest in the maintenance of employment of their own members—the choral singers—as well as an economic interest in the continued employment of those in allied trades.

[The court distinguishes from this case the following: *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881 (1897); *Haverhill Strand Theatre, Inc. v. Gillen*, 229 Mass. 413, 118 N. E. 671 (1918); and *Thompson v. Boekhout*, which is mentioned below under "Employers' Freedom to Work." It refuses an injunction on general principles, quite aside from the anti-injunction law. Two judges dissent.]

[The Court of Appeals on April 24, 1941, reversed this decision, 4-2.]

* * * *

One element in the *Opera on Tour* case was the question whether it was wrong for a union to hinder technological improvements. The court said, "No." The same conclusion was reached by the U. S. Supreme Court on April 7, 1941, when it rejected an indictment against the International Hod Carriers Union. The union had, by threat of strike, kept truck concrete-mixers out of Chicago.

The Supreme Court's rejection of that indictment was based on its decision in the *Hutcheson* case, which is reported in the next section. The *Hutcheson* case involved

the weapon of sympathetic union action, which we have been considering in this section. That weapon was involved even

more clearly in the two "rival union" indictments mentioned after the *Hutcheson* opinion.

IV. STRIKES AND BOYCOTTS AGAINST RIVAL UNIONS

The consumer boycotts and the sympathetic boycotts which we have just noticed may be used by a union to bring pressure to bear on either a non-union company or a company which deals with a rival union. A rival union may be either a company union, an independent union, a union affiliated to a rival federation, or a union affiliated to the same federation.¹

In the days of the *Hitchman* case, when yellow-dog contracts were taken seriously, a company might fortify its case against a union which was on the make by pointing to its "contract" with individual workers or with a company union. Today courts have been taught to watch out for company-domination, but an agreement with a regular union may be the basis of a decision to put legal obstacles in the path of an intruding union, though such an agreement too may

be challenged if it is the result of favoritism by the company.²

This new complex of attitudes is considered in greater detail later, in connection with the work of the National Labor Relations Board. The core of the matter is a distinction which has long been important in labor relations but which was crystallized by the National Labor Relations Act: the difference between the status which people accord to a majority and to a minority union.

Judges who usually condemn a boycott will naturally condemn it all the more when the company is bargaining collectively (with the rival of the boycotting union). But even judges who do not usually condemn boycotts are inclined to sympathize with the company which professes itself willing to bargain collectively but objects to the fact that, by bargaining and settling with a union, it cannot, as most employers can, get rid of the picket line of another union. If the company is dealing with a majority union and the minority pickets, the company's lawyer will naturally point out that the minority is wrongfully demanding that the company recognize it instead of the majority, and that this the National Labor Relations Act makes it illegal for the company to do.³

¹ "Rivalry" here includes jurisdictional disputes, namely, disputes between two unions which are affiliated to the same federation, which presumably has some mechanism for settling jurisdictional questions. An exhaustive discussion, with legal emphasis, of the other types of rival unionism is Walter Galenson, *Rival Unionism in the United States* (New York: American Council on Public Affairs, 1940).

There is no clear line between a union's attempt to win over a shop where a rival union is recognized and its attempt to win over a shop where the employees say they want to belong to no union, as seemed to be the case in the *Lauf* situation, reported above. In the *Meadowmoor* case, the non-affiliated milk wagon drivers who were being bothered by the A. F. L. joined its rival, the C. I. O. One phase of that case is reported earlier in this chapter; another, in Chapter 1.—C.R.

² Successfully challenged, for instance, in *International Association of Machinists v. N. L. R. B.*, reported in Chapter 5.—C.R.

³ If it is demanding the closed shop, it is asking the company to discharge workers because they have not joined the (minority) union. If it did so, it would be guilty of another violation of the N. L. R. A. See the section on the closed shop, below.—C.R.

FUR WORKERS UNION, LOCAL NO. 72 v. FUR WORKERS UNION, NO. 21238

U. S. Court of Appeals for the District of Columbia. 1939.
105 Fed. (2d) 1.

STEPHENS, Associate Justice: This is an appeal from an order of the District Court of the United States for the District of Columbia permanently enjoining the ap-

pellants from picketing the place of business of the appellee H. Zirkin & Sons, Inc., in Washington. The parties who must principally be referred to in the course of

this opinion are the appellant Fur Workers Union, Local No. 72 (an unincorporated association), of the International Fur Workers Union of the United States and Canada, affiliated with the C. I. O.; the appellee Fur Workers Union, No. 21238 (an incorporated association), affiliated with the American Federation of Labor; and the appellee H. Zirkin & Sons, Inc., a corporation of Washington, D. C. For convenience, these parties will be referred to as the appellant and the appellees; or where necessary for differentiation, as the appellant union, the appellee union, and the appellee Zirkin's, or Zirkin's.

The action was commenced by a bill in equity filed by the appellees. The appellants filed an answer and upon the issues joined there was a hearing. After several witnesses had testified on each side, the trial judge ordered a temporary injunction, and thereafter, upon the basis of some further testimony, a permanent one. This appeal was then taken.

The injunction was based upon findings of fact which, summarized, were to the following effect: For a long time prior to the commencement of the action, Zirkin's had been engaged in business in the District of Columbia as a retail dealer in ladies' clothing, including fur coats. Of a total of twenty-five employees, eleven were fur workers. On several occasions prior to August 15, 1937, the appellant had requested Zirkin's to acknowledge it as the sole representative of the fur workers. . . . [Two struck in August 1937.] On September 21, 1937, upon the application of seven of the remaining nine fur workers to the American Federation of Labor, the latter issued to the seven a certificate of affiliation authorizing the constitution of a unit to be named the Fur Workers Union, No. 21238, in Washington, to wit, the appellee union. . . . Zirkin's acknowledged and accepted the appellee union as the exclusive representative for collective bargaining of all of the fur workers then

in Zirkin's actual employ. Neither the refusal of the employees other than Schwartz and Haley to join the appellant union, nor the application for the issuance of a certificate authorizing constitution of the appellee union, occurred as the result of influence, coercion or persuasion on the part of Zirkin's.¹ Notwithstanding the foregoing, the appellant union, through its members and agents, continued to picket Zirkin's place of business. The picketing was in mass formation and in numbers as great as thirty-five, many of the pickets carrying banners or placards. The purpose of the picketing was to coerce Zirkin's and its fur worker employees to violate the agreement entered into with the appellee union and to cause Zirkin's to rescind its recognition of that union. The persons picketing Zirkin's place of business were disorderly in their conduct, made assaults and attempted assaults upon the fur worker employees at Zirkin's, intimidated and coerced them by threats of bodily harm, and interfered with customers of Zirkin's while they were entering or leaving the business establishment. The trial court further found as a fact that no labor dispute existed between the appellees and the appellants. The trial court made no findings that unlawful acts would be continued unless restrained, or that substantial and irreparable injury to the appellees' property would follow, or that, as to each item of relief granted, greater injury would be inflicted upon the appellees by the denial of relief than upon the appellants by the granting of it, or that the appellees had no adequate remedy at law, or that the public officers charged with the duty of protecting the appellees' property were unable or unwilling to furnish adequate protection.

[The lower court issued an injunction.]

The contentions of the parties to the appeal are based largely on the provisions of the Norris-LaGuardia Act [Sections 1,

¹ On the subject of coercion by Zirkin's, there was a conflict in the evidence.—C.R.

7, and 13, printed in Chapter 1] . . . , and the National Labor Relations Act [Sections 2, 7, 9, 10, and 13; see Chapter 5]. . . .

[Local 72's] contention is that under the facts and law, a labor dispute exists between the appellants and the appellees, and therefore, in the absence of the complete findings required by Section 7 of the Norris-LaGuardia Act, the trial court was without jurisdiction to issue the injunction. And, say the appellants, the findings required by the Norris-LaGuardia Act were not made.

I

. . . When the facts found in the instant case are viewed in terms of the definitions of Section 13, subsections (a), (b) and (c) of the [Norris-LaGuardia] Act, it is clear, we think, that the case is one involving or growing out of a labor dispute. . . .

II

But the appellees urge further, in support of the trial court's issuance of the injunction, that if it is to be said that a labor dispute existed at some stage of the instant controversy, that dispute terminated once the appellee union was chosen by a majority of Zirkin's employees as their collective bargaining agency. Or, putting it somewhat differently, the appellees say that if what is involved in the instant case is a labor dispute, it is not the kind of labor dispute in which an injunction is forbidden, but is on the contrary one in which despite the Norris-LaGuardia Act an injunction may and should issue. The appellees call attention to . . . the National Labor Relations Act, . . . subsection (a) of Section 9 . . . providing that representatives selected for collective bargaining by a majority of the employees in a unit appropriate for such purpose, shall be the exclusive representatives of all of the employees in such unit. Therefore, say the appellees, the picketing by the appel-

lant union after a majority of Zirkin's employees had chosen the appellee union as their bargaining agency, is unlawful, both as an interference with the vindicable right of the employees to self-organization and collective bargaining and as an attempt to compel the employer to commit an unfair labor practice; and therefore, the appellees urge, the picketing is subject to injunction. . . .

The appellees rely upon *Oberman & Co. v. United Garment Workers* [21 Fed. Supp. 20 (U. S. D. C., W. D. Mo., 1937)] . . . [There,] after a hearing and election the Board certified the Employees' Association, rather than the defendant, as the proper bargaining agency. Notwithstanding this the defendant continued [the] strike. . . . [It is] a case like the instant case in that two unions were disputing for recognition as the collective bargaining agency for the employees, the employer having contracted with the one representing the majority. The theory of the district judge was that once a certificate had been issued by the Board, any labor dispute which might be said to have existed theretofore, ended; and that the suit by the employer was under the National Labor Relations Act and not subject to the restrictions of the Norris-LaGuardia Act. The court said:

In the instant case there is no industrial dispute. If such dispute ever existed, it has been settled by the only authority that could settle such controversy, the National Labor Relations Board. For the court now to dismiss the bill on the ground of technical defect or weakness in surplus averments of the bill would be to permit a recurrence of the disorders which caused a complete shutdown of the factory, took away the employment and wages of 950 employees, and created discord, dissension, and unrest in the community where the factory is located. . . .

Lauf v. E. G. Shinner & Co. had not been decided by the Supreme Court at the time of the decision in this case.

In *Union Premier Food Stores v. Retail Food C. & M. Union* [98 Fed. (2d) 821 (C. C. A. 3d, 1938)] the defendants

were four unions which were attempting by picketing to cause employees to join them although the employees had theretofore refused—and this without influence on the part of the employer Company. Thereafter another union claimed to represent a majority of the employees. Then the employer, seeking to end the picketing by the defendant unions, agreed to enter into a contract with them; but the second union invoked action on the part of the National Labor Relations Board and the latter assumed jurisdiction and notified the plaintiff that charges of unfair labor practice had been filed against him. In the meantime the picketing continued, with consequent probable destruction of the employer's business, which involved the selling of perishable commodities. Contending that since the Labor Board had assumed jurisdiction of the dispute it was disabled from actually entering into a contract with the defendant unions, the Company sought by a bill in equity to enjoin the picketing. The trial court ordered an injunction and this order was sustained by the Court of Appeals. The theory of the majority in the latter court was that no labor dispute was involved in the case since the disputants were the unions, and that it could not be thought that Congress, under the National Labor Relations Act, intended to permit the destruction of the business of an employer who stood ready to obey any orders of the Board under the Act when issued. The majority distinguished *Lauf v. E. G. Shinner & Co.*, which by this time had been decided in the Supreme Court, upon the ground that therein the dispute was entirely between the employer and the picketing union because the employer refused to require his employees to join the union under penalty of discharge, whereas in the case under discussion the Board had taken that question away from the consideration of both the employer and the unions, so that they might not longer dispute about it. The court said that the re-

fusal of the employer to bargain collectively with either the picketing unions or the other union was not a refusal to bargain collectively with a representative of the employees, because while it was true that the other union claimed to be the representative, so did the picketing unions. The majority distinguished *Lauf v. E. G. Shinner & Co.* upon the further ground that in that case a Wisconsin State court had construed the facts to involve a labor dispute under Wisconsin law, whereas in Pennsylvania, where the case under discussion arose, the local courts had not yet defined what constituted a labor dispute under the Pennsylvania Labor Relations Act. The majority finally held that since there was no labor dispute in which the employer was involved, the District Court was not bound by the provisions of the Norris-LaGuardia Act in respect of injunctions.²

The last case relied upon by the appellees, *Donnelly Garment Co. v. International L. G. W. Union* [99 Fed. (2d) 309 (1938)], was again a two-union dispute for collective bargaining rights, with the employer indifferent. . . . The District Court . . . issued an injunction upon the theory that no labor dispute was involved. . . . But the Court of Appeals stated . . . that a labor dispute was involved, thus discountenancing the position originally taken by the District Court. . . .

III

We have given attentive consideration to the position taken by the appellees, but

² There was a dissent in this case by Circuit Judge Biggs who . . . was of the view that the phrase regarding proximate relationship used in the Act made clear that despite the fact that a proximate relationship of employer and employees does not exist still a dispute may be a labor dispute. Judge Biggs relied upon *Lauf v. E. G. Shinner & Co.* in the Supreme Court as confirming this view for the reason that in that case none of the employees were members of the picketing unions. . . .

[The *Union Premier* case went to the Supreme Court, which said that since the trouble had been settled, it was not necessary to give an opinion.—C.R.]

we nevertheless reach the conclusion that it is not a supportable one. The essential predicate of the argument is that once a majority of the employees of a particular employer have, without coercion on his part, made their choice of a bargaining unit, any labor dispute which may be said to have involved theretofore has ended; therefore the restrictions of the Norris-LaGuardia Act upon the issuance of injunctions are inoperative. Applying this proposition to the instant case the appellees say that the trial court has found that a majority of the employees of Zirkin's have selected the appellee union as their collective bargaining agency; therefore the labor dispute has ended and injunction may issue in protection of the choice of the majority. But this argument rests upon the assumption that the Federal courts have power to determine the lawful selection of a bargaining agency by employees. . . .

. . . On the contrary it seems clear that by the National Labor Relations Act Congress intended to confer exclusive initial jurisdiction upon the Board to determine the appropriate and lawfully selected bargaining unit for employees, and intended to give to the Board alone appropriate machinery, to wit, elections machinery, for making such determination. . . .

. . . In *Union Premier Food Stores v. Retail Food C. & M. Union*, while there had been no certification by the Labor Board, nevertheless there had been an assumption of jurisdiction by that Board. The case might therefore conceivably be justified upon the theory that the action of the court was not in aid of the employer, in defiance of the Norris-LaGuardia Act, but was to preserve the *status quo* for the uses and purposes of the National Labor Relations Board. Indeed, the majority opinion asserted this as a partial basis for its ruling. But in the instant case there has been neither certification nor assumption of jurisdiction by the Board. By ruling that these distinc-

tions are of moment in respect of the instant case, we do not assume to decide that if the Labor Board had made a certification or had assumed jurisdiction, injunction could issue. Such a question we should not rule upon until it is directly before us.

The conclusions we have reached above are confirmed in recent cases. In *Lauf v. E. G. Shinner & Co.* . . . the Court of Appeals said:

. . . Neither the employer nor any of his employees are engaged or involved in a labor dispute with anyone. The controversy, rather, seems to be a unilateral one with the sole object of coercing appellee to compel its employees to join the appellant union, in order that it may represent the employees in their dealings with the employer. Appellants seek to accomplish that result by picketing and damaging the employer's business. But, under the Norris-LaGuardia Act and the Wisconsin Labor Code, it would amount to a violation of both the federal and state law if appellee complied with appellants' demands, for under those laws the employer is specifically enjoined from influencing his employees in their choice of a union or their representative. The employees have refused to join the appellant union, they have organized their own union and have selected their own representative without interference or participation of their employer, and their rights in these respects are as fully protected by the laws as are those of appellants.

The declared public policy of both the nation and State of Wisconsin establishes the substantive rights of appellee's employees which the courts will protect by injunction, though no specific provision therefor be contained in either Act. *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, [Chapter 4]; *Trustees of Wisconsin State Fed. of Labor v. Simplex Shoe Mfg. Co.*, 215 Wis. 623, 256 N. W. 56. It being unlawful for appellee to dictate to its employees what organization they should join, or what representative they should select, and likewise unlawful to refuse to recognize the agency which they had selected, and recognize another representative which they had rejected, it follows that appellants' demand upon appellee was unlawful. [82 F. (2d) at 72]

This, it will be noted, is substantially the reasoning of the appellees in the instant case. But it was rejected in the Supreme Court . . . :

... We find nothing in the declarations of policy which narrows the definition of a labor dispute as found in the statutes. The rights of the parties and the jurisdiction of the federal courts are to be determined according to the express provisions applicable to labor disputes as so defined. [303 U. S. at 330]

In *Lund v. Woodenware Workers Union*, 19 F. Supp. 607 (D. Minn., 1937), and in *Blankenship v. Kurfman*, [96 F. (2d) 450 (1938)], the same conclusions were reached that we have reached in the instant case. The first of these two cases ruled upon the right of an employer to an injunction and the second upon the right of employees. In *Lund v. Woodenware Workers Union* an employer [said] ... that a majority of his employees had elected representatives for collective bargaining and that he had entered into a contract with them covering terms and conditions of employment, but that a minority of the employees had gone on strike and were, by acts of violence and intimidation, preventing the majority from working, with the result of closing the employer's factory so that he could not carry out the contract referred to. The employer relied upon subsection (a) of Section 9 of the National Labor Relations Act, and urged that by reason thereof he had a right as employer to proceed in a federal court to enjoin the minority from interfering with the contract made between him and the designated representatives of the majority. ... In a carefully considered opinion by District Judge Nordbye, the court, among other things, said: ...

The difficulty with the assumption of jurisdiction herein on the theory that plaintiff's case arises under the Wagner Act is due to the very apparent fact that the right that the plaintiff seeks to enforce is not created, either expressly or impliedly, by the federal statute in question, but by this proceeding he seeks to read into the act certain rights on behalf of the employer to proceed in a court of equity which Congress studiously refrained from giving to the employer. The courts cannot create a right that Congress did not see fit to grant. If any relief

were granted under the complaint, the court would be legislating in a field where Congress failed to take action. ... [19 F. Supp. at 609-611]

Blankenship v. Kurfman [96 F. (2d) 450 (1938)] involved a bill by employees for an injunction. The plaintiffs were employees of the Central Illinois Light Company and were members of a Brotherhood of Electrical Workers selected by a majority, without employer domination, which was negotiating a contract with the Light Company in respect of employment at common labor. The defendant was a local of the International Hod Carriers Building and Common Laborers Union, and it attempted, for the purpose of obtaining work for its members, to negotiate a similar contract with the Light Company. Because of the prior negotiations with the Brotherhood, the Light Company refused to negotiate with the representatives of the defendant union, and subsequently entered into a contract with the Brotherhood. Members of the latter then attempted to work, but as a result of violence and threats purposed to intimidate them into joining the defendant union, they abandoned their jobs. The contract with the employer had been negotiated and consummated generally in accordance with the National Labor Relations Act. There was no diversity of citizenship, and one of the grounds of federal jurisdiction relied upon by the plaintiffs was that the acts of the defendant union and its members denied the plaintiffs the free exercise of rights and privileges secured to them by the Act. The trial court found that the case did not involve a controversy between an employer and employees, and granted a temporary injunction, without the findings required by the Norris-LaGuardia Act. The decree was reversed in the Court of Appeals. ...

IV

Apparently invoking the doctrine that it is to be presumed that the legislature

would not intend a law to work hardship or injustice and therefore the resolution of ambiguity in a statute should be in favor of a just and equitable operation of the law, the appellee Zirkin's separately urges upon the court the hardship to an employer who, indifferent to the choice of a collective bargaining agency by his employees, is caught between the upper and nether millstones of disputing groups or unions. The argument is that unless injunction can issue in such a situation, the employer may well, for lack of other remedy, see his business destroyed, because neither union may be interested in applying to the National Labor Relations Board for an election and certification, and the employer is not, under the present terms of the National Labor Relations Act, given a right to invoke the jurisdiction of the Board to investigate and determine by election proceedings the appropriate bargaining unit and the agency reflective of the will of the majority of the employees.

While this argument is partially weakened by the fact that it rests upon an assumption that there is no possibility of protection of the employer under the Norris-LaGuardia Act, when under the terms of that Act an injunction may issue if the required findings are made,³ nevertheless the argument of hardship is impressive in this: Even if the evidence and findings are such that injunction may issue under the Norris-LaGuardia Act, still injunction is not an instrument which will excise the cause of the controversy. This can be accomplished only by an election so conducted as to result in a dependably free choice by a majority of the employees. . . . That Act makes no provision for invocation of the election and certification powers of the Board by an employer. . . .

We are constrained to conclude nevertheless that not even this argument of

hardship can avail the appellee Zirkin's. Where, under the language of a statute, the intent of Congress is plain, it is the duty of the courts to apply the statute as it stands, even if the consequence is hardship or injustice. And we think it so clear under the Norris-LaGuardia Act and the National Labor Relations Act, considered together, that the controversy involved in the instant case is a labor dispute and that only the National Labor Relations Board in the first instance can end that dispute by certification,⁴ and that no injunction can issue under the Norris-LaGuardia Act in the absence of the findings required thereby, that we must apply this plain intent of the statute without regard to the hardship upon the employer. Such argument of hardship must be addressed to Congress in respect of the possibility of an amendment of the National Labor Relations Act in such manner as will give to employers a right to invoke the jurisdiction of the Board for a settlement of disputes concerning rights of representation. . . .

The National Labor Relations Board issued a new rule, effective in July, 1939, permitting employers to petition for elections. See Chapter 5.

In December, 1939, the Supreme Court accepted the above decision in the *Fur Workers* case.

In September, 1939, the U. S. Circuit Court of Appeals for the 9th Circuit had decided *International Brotherhood of Teamsters v. International Union of United Brewery Workers*, 106 Fed. (2d) 871 along the same general lines as the *Fur Workers* decision. The two unions had fought since the beginning of the century over who was to control the teamsters who worked for breweries.⁵

⁴ Cf. the court's earlier statements that, after a Board election, the minority would perhaps continue to picket, and that it (the court) did not decide, in the present case, whether it would issue an injunction against the minority union in such a case.—*C.R.*

⁵ Oscar Ameringer, *If You Don't Weaken* (New York: Henry Holt and Company, 1940), pp. 189-

³ But only against violence and fraud.—*C.R.*

SUSPECT UNION PROJECTS—BOYCOTTS AND OTHERS

The district court in this case noted that the Brewers had an "industrial" charter from the A. F. L. which gave them control of those teamsters; it issued an injunction against the Teamsters union, having in mind not only the rights of the Brewery union but also the claims of the brewing companies of California, whose trade had been badly hurt by the inter-union jurisdictional dispute. The Circuit Court, however, rescinded the injunction. It said that the problem was one for the National Labor Relations Board. It noted that the Board now had a rule permitting employer election petitions where neither union petitioned for an election. The Brewers objected to the recall of the injunction on the ground that the Board was not authorized to hold elections in jurisdictional disputes—that is, when the two unions belonged to the same federation; the Board had, in fact, announced

in its regulations that it would not take such cases, presumably in order to encourage federal disputes or else in order to minimize the occasions for enmity toward the Board. The Circuit Court said simply that the Act permitted the Board to take such cases.

Legislation has been passed aimed at rival-union boycotts. We have seen that in 1938 Oregon voters accepted an anti-picket law (held void in 1940). It defined "labor dispute" to exclude rival disputes. So did the 1939 Wisconsin Employment Peace Act. Similarly the 1939 Pennsylvania law made the anti-injunction act inapplicable where a union had a minority or where two unions were disputing. The Oregon and Wisconsin laws put criminal penalties on picketing except in a "labor dispute." The 1939 Minnesota act aimed to make outsider picketing in general more difficult, by requiring that a majority of the pickets be ex-employees. Many anti-picketing ordinances have been aimed especially at outsiders picketing.

221; *California State Brewers Institute v. Teamsters*, 19 Fed. Supp. 924 (1937; contempt decision, Jan. 5, 1938); *United Union Brewing Co. v. Beck* (Teamsters), 93 Pac. (2d) 772 (Wash., 1939).—C R.

UNITED STATES *v.* HUTCHESON

Supreme Court of the United States. 1941.
311 U. S.—; 61 Sup. Ct. 463; 85 L. Ed. 422.

In 1939 the Department of Justice issued a statement about the application of the Sherman Act to labor unions and gave as its opinion that a strike or boycott which interfered with an established system of collective bargaining (a rival-union dispute) and affected interstate commerce was a violation of the act. A number of indictments were brought against unions on this theory,¹ and these cases were pressed even after the Court's opinion in the *Apex* case (see Chapter 1) seemed to rule against them. One of them came before the Supreme Court.

* * *

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman Law . . . is the question. It is sharply presented in this

case because it arises in a criminal prosecution. Concededly an injunction either at the suit of the Government or of the employer could not issue [because of the *Norris-LaGuardia Act*].

Summarizing the long indictment, these are the facts. Anheuser-Busch, Inc., operating a large plant in St. Louis, contracted with Borsari Tank Corporation for the erection of an additional facility. The Gaylord Container Corporation, a lessee of adjacent property from Anheuser-Busch, made a similar contract for a new building with the Stocker Company. Anheuser-Busch obtained the materials for its brewing and other operations and sold its finished products largely through interstate shipments. The Gaylord Corporation was equally dependent on interstate commerce for marketing its goods, as were the construction companies for their building materials. Among the employees of Anheuser-Busch were mem-

¹ Listed, to March 23, 1940, in 6 Labor Relations Reporter 154-55 (1940).

bers of the United Brotherhood of Carpenters and Joiners of America and of the International Association of Machinists. The conflicting claims of these two organizations, affiliated with the American Federation of Labor, in regard to the erection and dismantling of machinery had long been a source of controversy between them. Anheuser-Busch had had agreements with both organizations whereby the Machinists were given the disputed jobs and the Carpenters agreed to submit all disputes to arbitration. But in 1939 the president of the Carpenters, their general representative, and two officials of the Carpenters' local organization, the four men under indictment, stood on the claims of the Carpenters for the jobs. Rejection by the employer of the Carpenters' demand and the refusal of the latter to submit to arbitration were followed by a strike of the Carpenters, called by the defendants against Anheuser-Busch and the construction companies, a picketing of Anheuser-Busch and its tenant, and a request through circular letters and the official publication of the Carpenters that union members and their friends refrain from buying Anheuser-Busch beer. [Do these actions violate the Sherman Act?]

Section 1 of the Sherman Law on which the indictment rested is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." The controversies engendered by its application to trade union activities and the efforts to secure legislative relief from its consequences are familiar history. The Clayton Act of 1914 was the result. [Section 20 of that Act, printed in Chapter 1], withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the use of the injunction had been the major source of dissatisfaction—

and also relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." The Clayton Act gave rise to new litigation and to renewed controversy in and out of Congress regarding the status of trade unions. By the generality of its terms the Sherman Law had necessarily compelled the courts to work out its meaning from case to case. It was widely believed that into the Clayton Act courts read the very beliefs which that Act was designed to remove. Specifically the courts restricted the scope of §20 to trade union activities directed against an employer by his own employees. *Duplex Co. v. Deering*, 254 U. S. 443 [1921]. Such a view it was urged, both by powerful judicial dissents and informed lay opinion, misconceived the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts. *Ibid.*, p. 485-486. Agitation again led to legislation and in 1932 Congress wrote the Norris-LaGuardia Act [printed in Chapter 1].

The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction §20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the "public policy of the United States" in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and §20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

Were then the acts charged against the defendants prohibited or permitted by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in §20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States." So long as a union acts in its self-interest and does not combine with non-labor groups,² the licit and the illicit under §20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. There is nothing remotely within the terms of §20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. Such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism and has undoubtedly been one of the potent forces in the modern development of industrial unions. These conflicts have intensified industrial tension but there is not the slightest warrant for saying that Congress has made §20 inapplicable to trade union conduct resulting from them.

In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had before us precisely the same conduct on the part of the defendants in pressing claims against Anheuser-Busch for increased wages, or shorter hours, or other elements of what

are called working conditions. The fact that what was done was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which Congress has not put into the federal legislation and which therefore we cannot write into it.

It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by §20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by §20 for "terminating any relation of employment," or "ceasing to perform any work or labor," or "recommending, advising, or persuading others by peaceful means so to do." The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working." Finally, the recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that Act because outsiders to the immediate dispute also shared in the conduct. But we need not determine whether the conduct is legal within the restrictions which *Duplex Co. v. Deering* gave to the immunities of §20 of the Clayton Act. Congress in the Norris-LaGuardia Act

² Cf. *United States v. Brims*; 272 U. S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters. [This case is quoted in a later section.—C.R.]

has expressed the public policy of the United States and defined its conception of a "labor dispute" in terms that no longer leave room for doubt. *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U. S. 91. This was done, as we recently said, in order to "obviate the results of the judicial construction" theretofore given the Clayton Act. *New Negro Alliance v. Grocery Company*, 303 U. S. 552, 562 [reported above]; see *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 507, n. 26 [reported in Chapter 1]. Such a dispute, §13 (c) provides, "includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." And under §13 (b) a person is "participating or interested in a labor dispute" if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable

with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 391, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 Fed. 30, 32.

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary. "The purpose of the bill is to protect the rights of labor in the same

manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L., 738), which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H. Rep. No. 669, 72d Congress, 1st Session, p. 3. The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering*, *supra*, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters Association*, 274 U. S. 37 [reported above], as the authoritative interpretation of §20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light §20 removes all such allowable conduct from the taint of being a "violation of any law of the United States," including the Sherman Law.

There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment are made lawful by the Clayton Act in so far as "any law of the United States" is concerned, it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress. Cf. *Apex Hosiery Co. v. Leader*, 310 U. S. 469. It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure.

Affirmed.

MR. JUSTICE MURPHY took no part in the disposition of this case.

MR. JUSTICE STONE, concurring: As I think it clear that the indictment fails to

charge an offense under the Sherman Act, as it has been interpreted and applied by this Court, I find no occasion to consider the impact of the Norris-LaGuardia Act on the definition of participants in a labor dispute in the Clayton Act, as construed by this Court in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443—an application of the Norris-LaGuardia Act which is not free from doubt and which some of my brethren sharply challenge.

The indictment is for a conspiracy to promote by peaceful means a local "jurisdictional" strike in St. Louis, Missouri. Its aim is to determine whether the United Brotherhood of Carpenters or the International Association of Machinists, both labor organizations affiliated with the American Federation of Labor, shall be permitted to install certain machinery on the premises of Anheuser-Busch, Inc. in St. Louis. It appears that Anheuser-Busch brews beer and manufactures other products which it ships to points outside the state. It also uses supplies and building materials which are shipped to it from points outside the state. Borsari Tank Corporation is about to construct for Anheuser-Busch upon its premises a building for its use in brewing beer. L. O. Stocker Company has contracted and intends to construct an office building upon land of Anheuser-Busch adjacent to its brewery and leased by it to the Gaylord Container Corporation, a manufacturer of paper and cardboard containers which it ships in interstate commerce. It is alleged that both Borsari and Stocker will require and use in the construction of the buildings, materials to be shipped from points outside the state to the building sites on or adjacent to the Anheuser-Busch premises.

The indictment charges that pursuant to the conspiracy to enforce the jurisdictional demands appellees, who are officers or representatives of the Brotherhood, called a strike of its members, some seventy-eight in number, in the employ of Anheuser-Busch, attempted to call sym-

pathy strikes by members of other unions in its employ and caused the premises of Anheuser-Busch and the adjacent premises leased to Gaylord to be picketed by persons "bearing umbrellas and charging Anheuser-Busch, Inc. to be unfair to organized labor; with the intent to shut down the brewery and manufacturing plant of Anheuser-Busch, Inc., to hinder and prevent the passage of persons and property to and from said premises and thus to restrain and stop the commerce of Anheuser-Busch" in the beer and other products manufactured by it, and in the supplies and materials procured by it extrastate, and "to restrain the commerce" of Gaylord. It is alleged that pursuant to the conspiracy, defendants "refused to permit members of the United Brotherhood . . . to be employed and prevented such members from being employed by Borsari . . . with the intent and effect of preventing construction of the building about to be built by Borsari . . . and thus of restraining the commerce of Anheuser-Busch in beer . . . and also with the knowledge and willful disregard of the consequent restraint and stoppage of commerce in the materials intended to be used by Borsari." Like allegations are made with respect to Stocker with the added charge that the acts alleged were with intent to prevent performance of Stocker's contract with Gaylord "with willful disregard of the consequent restraint of the commerce of Gaylord."

There is the further allegation that pursuant to the conspiracy defendants and their co-conspirators have instigated and brought about a "boycott of beer brewed by Anheuser-Busch . . . and of dealers in said beer throughout the United States," by . . . "denouncing Anheuser-Busch, Inc. as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking said beer."

We are concerned with the alleged activities of defendants, actual or intended,

only so far as they have an effect on commerce prohibited by the Sherman Act as it has been amended or restricted in its operation by the Clayton Act. The legality of the alleged restraint under the Sherman Act is not affected by characterizing the strike, as this indictment does, as "jurisdictional" or as not within the "legitimate object of a labor union." The restraints charged are of two types: One is that resulting to the commerce of Anheuser-Busch, Borsari, Stocker and Gaylord from the peaceful picketing of the Anheuser-Busch premises, a part of which is leased to Gaylord, and the refusal of the Brotherhood to permit its members to work, and its prevention of its members from working (by what means other than picketing does not appear) for Borsari and Stocker. The other is that resulting from the requests addressed to the public to refrain from purchasing Anheuser-Busch beer.

It is plain that the first type of restraint is only that which is incidental to the conduct of a local strike and which results from closing the plant of a manufacturer or builder who ships his product in interstate commerce, or who procures his supplies from points outside the state. Such restraints, incident to such a strike, upon the interstate transportation of the products or supplies has been repeatedly held by this Court, without a dissenting voice, not to be within the reach of the Sherman Anti-Trust Act. There is here no allegation in the case of any of the employers of any interference, actual or intended, by strikers with goods moving or about to be shipped in interstate commerce such as was last term so sharply presented and held not to be a violation of the Sherman Act in *Apex Hosiery Co. v. Leader*, 310 U. S. 469.

With respect to Borsari and Stocker the indictment does no more than charge a local strike to enforce the jurisdictional demands upon Anheuser-Busch by the refusal of union members to work in the

construction of buildings for Anheuser-Busch or upon its land, the work upon which, so far as appears, has not even begun. The restraint alleged is only that resulting from the "disregard" by the strikers of the stoppage of the movement interstate of the building materials and the manufactured products of Gaylord consequent upon their refusal to construct the buildings. Precisely as in *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, where a local building strike with like consequences was held not to violate the Sherman Law, there is wanting here any fact to show that the conspiracy was directed at the use of any particular material in the states of origin and destination or its transportation between them "with the design of narrowing or suppressing the interstate market," each of which were thought to be crucial in *Bedford Co. v. Stone Cutters Ass'n*, 274 U. S. 37, 46-47. See *Apex Hosiery Co. v. Leader*, *supra*, 506.

As to the commerce of Anheuser-Busch and Gaylord, the indictment at most shows a conspiracy to picket peacefully their premises and publicly to charge the former with being unfair to organized labor, all with the intent to shut down the plant of Anheuser-Busch and to hinder and prevent the passage of persons and property to and from the premises and thus to restrain the commerce of Anheuser-Busch and Gaylord. There is also the allegation already noted that the refusal to work for Stocker will restrain the commerce of Gaylord, presumably because he will manufacture and ship less of his product if the proposed building is not completed.

It is a novel proposition that allegations of local peaceful picketing of a manufacturing plant to enforce union demands concerning terms of employment accompanied by announcements that the employer is unfair to organized labor is a violation of the Sherman Act whatever effect on interstate commerce may be intended to follow from the acts done. They,

like the allegations here, show only such effect upon interstate commerce as may be inferred from the acts alleged and in any event such restraint as there may be is not shown to be more than that which is incidental to every strike causing a shut-down of a manufacturing plant whose product moves in interstate commerce or stopping building operations where the builder is using materials shipped to him in interstate commerce. If the counts of the indictment which we are now considering make out an offense, then every local strike aimed at closing a shop whose products or supplies move in interstate commerce is, without more, a violation of the Sherman Act. They present a weaker case than those unanimously held by this Court not to involve violation of the Sherman Act in *United Mine Workers v. Coronado Coal Co.* (First Coronado Case), 259 U. S. 344; *United Leather Workers v. Herkert*, 265 U. S. 457; *Levering & Garrigues Co. v. Morrin*, *supra*, and see *Coronado Coal Co. v. United Mine Workers* (Second Coronado Case), 268 U. S. 295, 310. In any case there is no allegation in the indictment that the restraint did or could operate to suppress competition in the market of any product and so dismissal of these counts is required by our decision in *Apex Hosiery Co. v. Leader*, *supra*.

The second and only other type of restraint upon interstate commerce charged is the so-called "boycott" alleged to be by the publication of notices charging Anheuser-Busch with being unfair to labor and requesting members of the Union and the public not to purchase or use the Anheuser-Busch product. Were it necessary to a decision I should have thought that, since the strike against Anheuser-Busch was by its employees and there is no intimation that there is any strike against the distributors of the beer, that the strike was a labor dispute between employer and employees within the labor provisions of the Clayton Act as they were

construed in *Duplex Printing Press Co. v. Deering*, *supra*. In that case §20 of the Act, as the opinion of the Court points out, makes lawful the action of any person³ "ceasing to patronize . . . any party to such dispute" or "recommending, advising or persuading others by peaceful and lawful means so to do."

Be that as it may, it is a sufficient answer to the asserted violation of the Sherman Act, by the publication of such notices and requests, to point out that the strike was by employees of Anheuser-Busch; that there was no boycott of or strike against any purchaser of Anheuser-Busch beer by any concerted action or refusal to patronize him by the purchase of beer or other products supplied by him such as was condemned in *Loeive v. Lawlor*, 208 U. S. 274, 300-307; cf. *Apex Hosiery Co. v. Leader*, *supra*, 505; and finally that the publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress. See *Thornhill v. Alabama*, 310 U. S. 88.

I can only conclude that, upon principles hitherto recognized and established by the decisions of this Court, the indictment charges no violation of the Sherman Act.

MR. JUSTICE ROBERTS: I am of opinion that the judgment should be reversed.

The indictment adequately charges a conspiracy to restrain trade and commerce with the specific purpose of preventing Anheuser-Busch from receiving in interstate commerce commodities and materials intended for use in its plant; of

preventing the Borsari Corporation from obtaining materials in interstate commerce for use in performing a contract for Anheuser-Busch, and of preventing the Stocker Company from receiving materials in like manner for the construction of a building for the Gaylord Corporation. The indictment further charges that the conspiracy was to restrain interstate commerce flowing from Missouri into other states of products of Anheuser-Busch and generally to restrain the interstate trade and commerce of the three corporations named.

Without detailing the allegations of the indictment, it is sufficient to say that they undeniably charge a secondary boycott, affecting interstate commerce.

This court, and many state tribunals, over a long period of years, have held such a secondary boycott illegal. In 1908 this court held such a secondary boycott, instigated to enforce the demands of a labor union [the Danbury Hatters] against an employer, was a violation of the Sherman Act and could be restrained at the suit of the employer. It is matter of history that labor unions insisted they were not within the purview of the Sherman Act but this court held to the contrary. As a result of continual agitation the Clayton Act was adopted. . . . Subsequently suits in equity were brought to restrain secondary boycotts similar to those involved in earlier cases. The contention was made that the Clayton Act exempted labor organizations from such suits. That contention was not sustained. Upon the fullest consideration, this court reached the conclusion that the provisions of Section 20 of the Clayton Act governed not the substantive rights of persons and organizations but merely regulated the practice according to which, and the conditions under which, equitable relief might be granted in suits of this character. Section 6 has no bearing on the offense charged in this case.

This court also unanimously held that

³ Appellees, being national and local officers of the Brotherhood and representing the employees in the labor dispute with their employer, are "proximately and substantially concerned" as parties to an actual dispute and are, therefore, entitled to the benefits of the Clayton Act. See *Duplex Printing Press Co. v. Deering*, *supra*, 470, 471.

a conspiracy such as is charged in the instant case renders the conspirators liable to criminal [anti-trust prosecution, in the *Brimms* case (reported below)].

It is common knowledge that the agitation for complete exemption of labor unions from the provisions of the anti-trust laws persisted. Instead of granting the complete exemption desired, Congress adopted, March 23, 1932, the Norris-LaGuardia Act. The title and the contents of that Act, as well as its legislative history,⁴ demonstrate beyond question that its purpose was to define and to limit the jurisdiction of federal courts sitting in equity. The Act broadens the scope of labor disputes as theretofore understood, that is, disputes between an employer and his employees with respect to wages, hours, and working conditions, and provides that before a federal court can enter an injunction to restrain illegal acts certain preliminary findings, based on evidence, must be made. The Act further deprives the courts of the right to issue an injunction against the doing of certain acts by labor organizations or their members. It is unnecessary to detail the acts as to which the jurisdiction of a court of equity is abolished. It is sufficient to say, what a reading of the Act makes letter clear, that the jurisdiction of actions for damages authorized by the Sherman Act, and of the criminal offenses denounced by that Act, are not touched by the Norris-LaGuardia Act.

By a process of construction never, as I think, heretofore indulged by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to

be that an indication of a change of policy in an Act as respects one specific item in a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do.⁵

The construction of the act now adopted is the more clearly inadmissible when we remember that the scope of proposed amendments and repeals of the anti-trust laws in respect of labor organizations has been the subject of constant controversy and consideration in Congress. In the light of this history, to attribute to Congress an intent to repeal legislation which has had a definite and well understood scope and effect for decades past, by resurrecting a rejected construction of the Clayton Act and extending a policy strictly limited by the Congress itself in the Norris-LaGuardia Act, seems to me a usurpation by the courts of the function of the Congress not only novel but fraught, as well, with the most serious dangers to our constitutional system of division of powers.

THE CHIEF JUSTICE joins in this opinion.⁶

⁵ The rule always heretofore followed in respect of implied repeal was recently expounded in an analogous situation in *United States v. Borden Co.*, 308 U. S. 188, 198.

⁶ The *Hutcheson* decision was confirmed on April 7, 1941, when the Supreme Court rejected two indictments against unions accused of "unreasonably" restraining trade by assailing an established system of collective bargaining. (1) The Building and Construction Trades Council of New Orleans and twenty-one related A.F.L. unions had refused to work on materials delivered in interstate commerce and trucked by members of the C.I.O. Transport Workers Union, which had won an election against the A.F.L. Teamsters. (2) The A.F.L. Carpenters, after losing an election to the C.I.O. in a lumber company in the state of Washington, had tried to prevent the company from selling wood for interstate shipment.

On analogy with the *Hutcheson* decision, also, the Court rejected, on the same day, an indictment against a union accused of "unreasonably" restraining trade by hindering technological improvement; the International Ho¹ Carriers Union had prevented the use of truck concrete-mixers in Chicago.—C.R.

⁴ S. Rep. No. 163, 72nd Cong., 1st Sess., pp. 7-8; H. Rep. No. 669, 72d Cong., 1st Sess., pp. 2-3; 75 Cong. Rec. 5464; 5467.

LABOR CASES AND MATERIALS

V. CLOSED-SHOP DEMANDS

Many of the union actions taken up so far were directed toward the closed shop, a fact which aggravated their appearance of illegality, for instance in the picketing by "outsiders." Rival unionists, when they are a minority and picket, might conceivably be picketing for minority representation; actually they are usually trying to oust the majority and get a closed shop. Even where the union has not mentioned the closed shop, or has mentioned it only as a bargaining demand, not yet to be insisted on, company statements to the press or to a court have made as much as possible of the bad odor which attaches to "the closed shop." See, for instance, the *Hitchman* decision, in the previous chapter. As a matter of fact, employers are quite right in predicting that, as soon as a union is strong enough, it will press for the closed shop. Only where unions are well entrenched do they feel secure enough to make the gesture of not demanding the closed shop. Even then, their members may still argue that it is not right for the non-members to benefit by union bargaining without paying dues. They liken the dues to taxes; though everyone pays taxes unwillingly, yet everyone acknowledges the need for most current government services. The penalties threatened by the tax collector have their counterpart in the fact that in many cases unionists, who are average and not especially aggressive people, approve of using violence to gain members or to win a closed-shop demand.

In an earlier chapter we quoted Professor Barloon to the effect that violence was fairly sure to happen when a struck plant tried to run. In the same article he stated that not only did the American people in general approve of collective bargaining,¹ but that every worker wanted some agency to bargain for him, and was likely to vote for the union in an N. L. R. B. election even though he was not paying dues to it. The author concluded that where a majority chose a union the minority ought to be compelled to pay dues to it.²

Not only have many judges condemned strikes and boycotts wholly or partly on the ground that the unionists demanded the closed shop, but they have sometimes based their opposition on legislation which was passed for a different purpose. In the section on "outsiders'" appeals we noted that such a use had been made of "declarations of public policy" aimed to prevent yellow-dog injunctions like the *Hitchman* injunction. These declarations told employers that they should not put pressure on their employees to stay out of the union. To make the legislation seem even-handed, or in order to include company-dominated unions in the ban, the declarations often also told employers that they should not make their men *join* any union. A closed-shop demand then seems to be asking the company to put unlawful pressure on some or all of its employees.³ This would be all the more true if the legislature had passed a labor relations act which put *penalties* on any company which influenced its employees in their selection of a bargaining agency. This principle, however, is contradicted by the fact that all these laws were passed to help unions (which more or less implies "to help the closed shop"), and more especially by the fact that the labor-relations laws recognize the closed shop by saying that it is not "discrimination" if the firm tells a minority to join the majority union or be fired. Moreover, the anti-injunction laws have tried to free closed-shop strikes from injunctions (leaving a theoretical power to sue for damages where judges disapprove the closed-shop principle).

Both before and after the new legislation some state courts have spoken in favor of the closed shop, others against it. Some condemned closed-shop *strikes* but would give no legal aid to workers who were displaced when an employer succumbed to "illegal" pressure and signed a closed-shop contract. Others, condemning it a little more, gave

³ This argument was rejected in the *Lauf* decision (fourth point), above, in *McKay v. Retail Automobile Salesmen and Shafer v. Registered Pharmacists*, 106 Pac. (2d) 373 ff. (Cal., 1940), and in *Denver Local v. Perry Truck Lines*, 101 Pac. (2d) 436 (Col., 1940). Cf. the similar argument in *Fur Workers v. Fur Workers*, reported above.—C.R.

¹ Cf. the Studenski experiment, just below.—C.R.

² Marvin J. Barloon (Department of Business and Economics, Western Reserve University), "Violence and Collective Bargaining," *Harper's Magazine*, No. 1080:627-30, May, 1940.—C.R.

legal aid in those cases in which the contract was monopolistic in being so widespread that it cut the non-union men off from all job opportunities in their line. This last position has been the traditional New York position, reconsidered in *Williams v. Quill*, below.⁴

⁴ A strong stand against the closed shop, based on general principles and interpreting away the state

anti-injunction law, was taken by the Maine supreme court in the *Keith* case, 134 Maine 392 (1936); the opinion reviews the precedents against the closed shop. See also *Charles Cushman Co. v. Mackery*, 135 Maine 490, 200 Atl. 505 (1938), and *Mackery v. State*, 200 Atl. 511 (1938), upholding not only an injunction but also conspiracy convictions against organizers of C. I. O.'s United Shoe Workers, who had called a strike in a region to which Massachusetts shoe factories had fled to avoid union wages.—C.R.

TWO POLLS OF PUBLIC OPINION ON THE CLOSED SHOP¹

In July 1939 was announced the result of a national poll which had been conducted on behalf of a national association of employers. One of the questions was: "Should every worker be forced to join a union?" Of the persons interviewed, 61 per cent voted against, 20 per cent in favor; 11 per cent gave qualified answers.

Professor Paul Studenski of New York University's School of Commerce had 150 students answer the question and a week later checked the adequacy of the question to bring out people's opinions by posing the same problem to them in different words. The results, reported below, made him conclude that the original question was not adapted to finding out their actual attitudes.

¹ Material derived from Paul Studenski, "How Polls Can Mislead," *Harper's Magazine*, No. 1075: 80-83, December, 1939. In June the Institute of Public Opinion had stated that 71 per cent of those it canvassed were against the shop's requiring all eligible workers to join a union.—C.R.

FIRST FORM

Should every worker be forced to join a union?

Yes	9.3 per cent
No ..	88.9 "
Don't know	1.8 "
Total	100.0 "

SECOND FORM

Is it proper for a union to require all wage earners in an industrial enterprise to join the union—

Under any circumstances? .	7.4 per cent
When the union controls a minority of the employees?	2.6 "
When the union controls a majority of the employees?	37.6 "
Or is it improper under any circumstances	45.0 "
Don't know	7.4 "
Total	100.0 "

WILLIAMS v. QUILL

Court of Appeals of New York. 1938.
277 N. Y. 1; 12 N. E. (2d) 547.

CRANE, Ch. J. The counsel in this case, with commendable frankness, have narrowed the question to be decided to a single point. The contract which the defendants entered into, pursuant to section 704, subdivision 5, of the Labor Law (Cons. Laws, ch. 31), is conceded to be legal, except as to the New York Rapid Transit Corporation and the other defendants, and only illegal as to them because they furnish the only labor market locally for the plaintiffs.

After an election held among the employees of the defendant corporations on July 31, 1937, pursuant to the said Labor Law, the Labor Board certified that the defendant Transport Workers Union of America was selected as representative for collective bargaining in the eleven groups of the defendant corporations' employees covered by the contract thereafter made. After long negotiations and threatened strikes the said Transport Workers Union and the defendants made a contract which

in this case has been attacked as being illegal because of provision No. 6. It reads:

"6. The parties of the first part will not, during the term of this agreement, employ any employee in the groups represented by the parties of the second part to which this agreement applies who is not, or who does not, within one month after his employment, become and remain a member in good standing of the Transport Workers Union of America: and all present employees of the groups to which this agreement applies who are not now members of the Transport Workers Union of America shall become members within thirty (30) days of the date of this agreement and remain members in good standing.

It is conceded by the defendants that they do not desire in any way to interfere with the employment of the plaintiffs or those who are not members of the union, except in so far as to ask and require them to join in compliance with this contract. Section 704 of the Labor Law, entitled "Unfair labor practices," states:

"It shall be an unfair labor practice for an employer . . .

"5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment: Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five."

The Transport Workers Union of America is the representative of the defendants' employees, selected and elected pursuant to said section and said Labor Law. The contract referred to was made pursuant to the terms and conditions of this law, so the only question presented is whether or not the contract is legal. Section 704 is new, added by chapter 443 of the Laws of 1937, taking effect July first of that year. Before the passage of this act this State at least recognized the rights of labor to combine and to strike for the purpose of procuring employment for its own workmen and to advance their in-

terests; also the right to invite or solicit other workmen to join their union and to enforce by legal measures their demands. . . .

In 1927 this court, in *Exchange Bakery & Restaurant Inc. v. Rifkin*, (245 N. Y. 260), stated in the prevailing opinion:

"The purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally. That they may prevail it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured" (p. 263).

This case has become the law of this State and has been followed in other instances. Therefore, we approach this case in the light of the law as it was before section 704 of the Labor Law was adopted, and we find that a labor organization is permitted to combine and to strike in a particular industry for the purpose of obtaining employment for its own people, even to the extent of excluding others from the entire industry who are not union men. The one reservation in this law is that the attempt to accomplish the end shall be carried out in good faith and for the declared purposes, and not through malice or ill-will or a desire to injure non-union employees or simply and solely for the purpose of keeping them out of work.

If all this be lawful, what is there unlawful in negotiating with an employer to

accomplish through peaceful negotiations that which the law permits to be done through strikes, which lead so frequently to disruption of business and violence? If the railroads in this instance, acting upon their own initiative, determined to dispense with the services of non-union men, I know of nothing in the law which would prevent them from doing so; or, to put it in a different way, if the defendant employers should come to their decision that, for the good of their enterprises, they would thereafter only employ union men, I do not see how the law could prevent them from doing so, or from discharging the plaintiffs and their non-union employees. It might be an unpleasant situation for all, but, nevertheless, one with which the law could not interfere. Recognizing this, I take it that it would not be unlawful because such a determination had been arrived at by the solicitation or request of the unions or labor organizations. And then, to go one step further, why would it become illegal if the arrangements and determination were embodied in a contract or a written agreement with the labor organizations? Section 704 of the Labor Law above quoted evidently recognized the existing law and was passed in order to enable the employer to have some representative body with whom to negotiate and labor, by its own selection, create a committee of representatives through whom contracts and negotiations could be made with authority, and which would hold like other contracts before the law.

In *Curran v. Galen* (152 N. Y. 33) this court considered a contract similar to the one we are here discussing to be void, but the reason for the decision was later explained in *Jacobs v. Cohen* (183 N. Y. 207) to be the malice, ill-will and injury intended the employee or plaintiff in the case; that the purpose was to prevent him from obtaining any employment. Such, of course, is not the purpose of this contract. Judge GRAY in this *Jacobs* case went further than merely to explain the ruling

in the *Curran* case, and attempted to lay down for the court the law of this State relating to the relationship of employer and employee. He said:

" . . . This contract was voluntarily entered into by the Cohens and, if it provided for the performance of the firm's work by those only who were accredited members, in good standing, of an organization of a class of working-men whom they employed, were they not free to do so? If they regarded it as beneficial to them to do so (and such is a recital of the contract), does it lie in their mouths, now, to urge its illegality? That, incidentally, it might result in the discharge of some of those employed, for failure to come into affiliation with their fellow-workmen's organization, or that it might prevent others from being engaged upon the work, is neither something of which the employers may complain, nor something with which public policy is concerned" (p. 215). . . .

In *American Steel Foundries v. Tri-City Central Trades Council* (257 U. S. 184, at p. 209), referring to the recognition which the Clayton Act had given labor unions, Chief Justice TAFT, in writing the opinion for the court, said: ". . . The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood." . . .

As I have stated at the beginning, the attorney for the plaintiffs has conceded that this contract is valid and that the law is constitutional except in the one particular stated, which is that, as the defendant employers constitute the main transit and railroad lines in the locality stated, there is by this contract a monopoly created; that is, if only union men are to be employed, the plaintiffs, if they refuse to

join the union, will be without employment. Upon the argument counsel was led to state that carrying out this doctrine to its logical conclusion all such contracts would be illegal where the employer in a village or town or small community was the only one in that particular line of business. We think that this distinction is not justified, and that if there be an evil in the monopoly of the labor market in a particular industry by labor organizations it is a matter to be considered by legislatures and not by the courts, for the reason that there are two sides to the question—the other side being that the labor organizations, through this means of contracting and negotiating, are enabled to strengthen their representative bodies and to effectuate collective bargaining. Of course, demands on either side may be carried too far. These, however, are not matters for the courts to consider. Public opinion is soon reflected in legislation. We can simply approach the question and decide it according to principles of law. The wisdom of legislation or the reasonableness of action under legislation are matters which must be put aside by us in considering these questions.

Besides, we find recognition of this rule in paragraph 2 of section 340 of the General Business Law (Cons. Laws, ch. 20), relating to monopolies. Agreements are declared to be void and against public policy which create or maintain a monopoly in the manufacture, transportation or the free pursuit of any lawful business, trade or occupation. Paragraph 2, however, says that these provisions shall not apply to co-operative associations, corporate or otherwise, of farmers, gardeners or dairymen, nor to contracts, agreements or arrangements made by such associations, nor to *bona fide* labor unions.

Upon this appeal a question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiffs contended that section 340, subdivision 2, of the General Business Law

of the State of New York is in violation of, and repugnant to, the Fourteenth Amendment to the Constitution of the United States. This court holds that [it does not violate it].

The order appealed from should be affirmed, without costs, and the question certified answered in the negative.

The federal Supreme Court refused to review this case.

A contrary position was taken by an Ohio appellate court in 1939, in *Scaggs v. Transport Workers and Akron Transportation Company*, 1 Labor Cases 1029 (Ohio, 1939). The court held the closed-shop agreement of a monopolistic urban bus company to be invalid, giving as precedent *Polk v. Cleveland Railway Co.*, 20 Ohio App. 317. It said that the National Labor Relations Act did not validate closed-shop agreements generally; that the company was not under the act and that, even if it were, the law of the state existed separately and was against the closed shop.

A closed-shop movement may be aimed to exclude rival-union members as well as non-union men. The Commercial Telegraphers Union (A. F. L.) got the help of the Fishermen's Union (A. F. L.); the latter refused to work with radio operators who were members of the American Communications Association (C. I. O.). In this case the National Labor Relations Board took a stand against the closed shop, since it was causing the company to discriminate against C. I. O. members because of their membership and did not have the excuse of being based on a closed-shop contract with a union having a majority in the bargaining unit involved. It told the company not to fire the men—to take the punishment of the Fishermen's sympathetic action. One member dissented. *Cape Cod* case, 23 N. L. R. B. No. 18 (1940).

The closed shop has seemed especially monopolistic and objectionable in cases in which the union refused to admit new members, in order to keep the jobs for its then members. *Shinsky v. O'Neil*, 121 N. E. 790 (Mass., 1919); *Wilson v. Newspaper Deliverers*, 123 N. J. Eq. 347 (1938). Cf. the holding that if the union has an open membership its mo-

nopolistic tendency is not against public policy. *Harris v. Geier*, 112 N. J. Eq. 99 (1932).

A Pennsylvania court held that a dispute over firing men because of a closed-shop agreement was not a "labor dispute" and an injunction might be issued to help the men get their jobs back, regardless of the anti-injunction law. Damages were awarded, too, for their lost time. The court found that the union was closed to the men because they had refused to join before the contract was signed. *Dorrington v. Manning*, 135 Pa. Super. Ct. 4 (1939).

A union may refuse admittance directly or indirectly—for instance, by charging very

high initiation fees. Other unions say that they do not ask the "closed shop" but the all-union shop—under which anyone who gets a job may (and must) join the union.

There seems to be a tendency to ask, as the price of governmental aid for collective bargaining and the closed shop, that unions give up practices like closing their books to new members. Thus the Pennsylvania labor relations law, passed in 1937, included a clause denying the benefits of the act to unions which openly or tacitly discriminated against applicants on grounds of race, creed, or color. In 1940 New York passed a law along similar lines:

A LAW AGAINST DISCRIMINATION BY UNIONS

Consolidated Laws of New York, Civil Rights Law, §§43 and 41, added by Laws of 1940, Chap. 9, §§1-2.

SECTION 43. *Discrimination by labor organizations prohibited.* As used in this section, the term "labor organization" means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection. No labor organization shall hereafter, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of his race, color or creed, or by regulations, practice or otherwise, deny to any of its members, by reason of race, color or creed, equal treatment with all other members in any designation of members to any employer for employment, promotion or dismissal by such employer. . . .

SECTION 41. *Penalty for violation.* Any . . . officer or member of a labor organization, as defined by section forty-three of this chapter, or any person representing any organization or acting in its behalf

who shall violate any of the provisions of section forty-three of this chapter or who shall aid or incite the violation of any of the provisions of such section shall for each and every violation thereof be liable to penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the person aggrieved thereby or by any resident of this state, to whom such person shall assign his cause of action, in any court of competent jurisdiction in the county in which the plaintiff or the defendant shall reside; and such person and the manager or owner of or each officer of such agency, bureau, corporation or association, and such officer or member of a labor organization or person acting in his behalf, as the case may be, shall, also, for every such offense be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, or shall be imprisoned not less than thirty days nor more than ninety days, or both such fine and imprisonment. [Effective February 14, 1940.]

VI. EMPLOYERS' FREEDOM TO WORK

Unions sometimes demand that the employer do not himself work at the bench, in order to give more work to the journeymen union members. A court may view a strike for this purpose as an unreasonable one. Not a strike but a boycott of some sort is needed if the union is making a demand for the hir-

ing of a union member in a shop which is run only by the proprietor and his family. This special boycott case has come up fairly often recently and it is usually held that there is no labor dispute, so that the anti-injunction laws do not apply and judges may issue injunctions as freely as before.

YABLONOWITZ *v.* KORN

Appellate Division of the Supreme Court of New York. 1923.
205 App. Div. 440; 199 N. Y. Supp. 769.

SMITH, J. The plaintiff has a little meat market at No. 2 East 112th street in the city of New York. He formerly was a member of the Hebrew Butcher Workers' Union of Greater New York, of which the defendant Korn was an organizer. For some reason the plaintiff dissolved his connection therewith. For some time he had two employees, who were not union men, but who later joined the union and then went upon a strike. He then conducted his business with the aid of his son and his wife alone. The defendants, however, picketed the shop, and have since been picketing the shop, and have been intimidating customers from coming there, and by their acts and words threatened to ruin his business. The plaintiff sought an injunction to prevent the defendants from picketing his shop and interfering with his business. . . .

. . . The plaintiff has attempted to employ no more men to work for him since the two men were taken away by the union and says he does not intend to, but this picketing is still kept up with the apparent purpose either of compelling him to employ helpers who are members of the union or of ruining his business. There was very considerable evidence by affidavit of interference with the plaintiff's business. Many customers of plaintiff swore to acts of interference and violence against them and of creation of disturbances in front of plaintiff's store.

While the defendants also produced many affidavits, the evidence is mostly of a negative character, that those making the affidavits did not see any interference or disturbance. In such a case as this proof of actual occurrences is of great weight, while proof that affiants *did not see*, is of little weight. It is a matter of common knowledge when pickets are hovering around a place for the purpose of preventing the conduct of business, and that is the only object that is at present apparent, it does constitute an intimidation, especially to women patrons. In any event, if the defendants are not engaged in this picketing and are not committing these offenses, they have nothing of which to complain if an injunction be granted. Under the authorities, as well as under common sense, a man has the right to conduct his business in such way as he desires, and he should not be driven out of business by any combination of persons, especially where he employs no workmen and his family are the only ones who help him in the business. . . .

This is purely a high-handed attempt to run this man's business, and all sense of fair play is outraged in allowing this picketing to continue. It is not for the purpose of assisting the employees, because those who were before employed had left and no new ones were employed. It is simply for the purpose of intimidating and coercing this plaintiff to hire union

men. There is abundant proof of their misrepresenting the quality of meat sold by the plaintiff, and of their approaching the customers of the plaintiff in a way not only to intimidate them, but to persuade them not to buy meat of the plaintiff, and that they have no right to do. The defendants should be enjoined from picketing this place in any way, or from addressing any of the customers of the plaintiff for the purpose of diverting their trade.

The order should therefore be reversed, with \$10 costs and disbursements, and the injunction granted. . . .

DOWLING, J., dissents.

The New York courts have followed this principle, even after the passage of the state anti-injunction law. *Thompson v. Boekhout*, 273 N. Y. 390 (1937). See also *Luft v. Flove*, 270 N. Y. 640. The Tennessee supreme court took the same view. *Lyle v. Local No. 452*, 124 S. W. (2d) 701 (1939). The *Thompson* and *Lyle* cases are typical—one a small motion-picture theatre in which the proprietor acts as projectionist; the other a small butcher shop.

A New York court held that a company winding up its affairs and trying to sell off its stock may get an injunction against picketing. *Wishny v. "John Jones,"* 8 N. Y. Supp. (2d) 2, 169 Misc. 459 (1938). New York's highest court held that it will not enjoin picketing to replace owner-workers by unionists where the work of a corporation is all done by stockholders (in other words, where the employees have become stockholders). It

emphasized that the corporation was legally a separate entity and that the men worked as employees and not as stockholders. *Boro Park Sanitary Live Poultry Market, Inc. v. Heller*, 280 N. Y. 481 (1939). However, when the firm became a partnership it was able to get an injunction against the pickets who demanded a closed shop. *Kershner v. Heller*, 14 N. Y. Supp. (2d) 595 (1939). A New York court condemned the misrepresentation involved in the pickets' statement that work was "done by non-union labor." *Zweibon v. Goldberg*, 6 Labor Relations Reporter 397 (N. Y., 1940).

An exception to the New York rule was apparently made by Justice Cotillo in *Schwartz v. Fish Workers*, 170 Misc. 566 (N. Y., 1939), where he held that there was a labor dispute because the store was a member of an association which was negotiating with the union, though there were no employees in the store. At his suggestion the union agreed to stop claiming that there was a lockout at that store.

The highest New York court seems inclined to modify its stand in the *Boekhout* case, above; for in *Baillis v. Fuchs*, 27 N. E. (2d) 812 (N. Y., 1940) it held, in a case in which the owners were doing all the work, that only violence in picketing was to be forbidden, since the picketers were employees who had gone out on strike at a time when the firm still had employees, so that there was a "labor dispute."

Some federal courts are inclined to refuse injunctions in such cases, as we shall see.

Senn v. Tile Layers, reported above, involved a demand that the "employer" stop working. The injunction was refused, and this refusal influenced the court in the *Rohde* case, just below.

ROHDE v. DIGHTON

U. S. District Court (W. D. Mo.). 1939.
27 Fed. Supp. 149.

REEVES, District Judge: The complainants seek to restrain the defendants individually and as representatives of a labor organization from interfering with the operation of a theatre owned by them and

currently operated by them without the services of employees. It is the contention of the complainants that, under such circumstances, there could not be a labor dispute, and that, therefore, they are entitled

to injunctive relief as in the ordinary case in equity where there is an interference in the operation of a business.

. . . The jurisdiction of the court is sought by reason of a diversity of citizenship, and an adequate value is in controversy.

The complaint is to the effect that the plaintiffs are operating a motion picture theatre at 7106 Prospect Avenue, Kansas City, Jackson County, Missouri, known as the Sun Theatre, and that defendants are interfering with such operation by picketing and otherwise. The plaintiffs detail their previous relationship to defendants by saying that, in September 1937, they were coerced to employ a union operator for their motion picture machine. They did this, although some of the owners were expert and competent for the manipulation and operation of the machine. They agreed to pay the union operator \$35 per week, being \$13 per week less than the union scale for such operators. Plaintiffs did this, so they say, to prevent interference by the defendants with the operation of their theatre. On January 16, 1939 the defendants demanded payment to the operator in accordance with the union scale. The plaintiffs declined to yield to this demand and discharged the operator and resumed their own operations without the aid of employees. They state in their petition that: "they do not discriminate against Union labor, but merely choose to employ no labor, but to do the work themselves." The complaint contains averments of serious interference with the operation of their theatre by the acts and conduct of the defendants. . . .

. . . That there is a labor dispute can hardly be questioned in the light of the authorities.

The controlling, or most persuasive case on that question is that of *New Negro Alliance v. Grocery Co.*, [above. There] the complainant sought an injunction because its business was picketed or there was an interference with its business

operations by the defendant through its agents and representatives. The reason for the interference was that the plaintiff employed all white and no colored workmen. The Supreme Court held that within the purview of the Norris-LaGuardia Act there was a labor dispute. In this case, the employer had a full complement of employees. The defendants sought to compel the employment of colored workmen. . . .

The case of *Senn v. Tile Layers Protective Union* [reported above] is somewhat analogous to the point here raised, although it involved the interpretation of a state statute. The court declined to quash the opinion of the Supreme Court of Wisconsin in a case where a labor union had sought to compel an employer to refrain from doing his own work without joining the union. The court said that it was the right of the state to adopt such a policy and that guaranties of the federal constitution were not violated.

In view of the above, it must be concluded that the complaint on its face shows a labor dispute, and because of that fact, the court is without jurisdiction to issue a temporary injunction.

. . . The application for a temporary injunction . . . should be denied. . . .¹

A union demand somewhat analogous to the demand that the employer should not work is the attempt to limit the contracting system. The *Meadowmoor* and other milk-driver cases noticed above under "sympathetic action" arose out of the union's attempt to prevent the milk companies lowering the drivers' pay by making each driver into a separate enterprise.

The New York courts have held legal the dress union's demand that contractors be limited in number and assigned to definite jobs—in order to ease the pressure of com-

¹ On May 26, 1939, the court decided that less than \$3,000 was involved, so that it had no jurisdiction. It dismissed the case and ordered the firm to pay the union the costs which it had incurred. —C.R.

petition on the union members. *Sainer v. Affiliated Dress Manufacturers, Inc.*, 5 N. Y. Supp. (2d) 855 (1938). Similarly they have refused an injunction against union picket-

ing intended to make jobbers assume responsibility for the actions of their contractors. *Abeles v. Friedman*, 14 N. Y. Supp. (2d) 252 (1939).

VII. MONOPOLISTIC PRICE-RAISING

We saw in Chapter I that the 1940 *Apex* decision seemed to confine the application of the Sherman Act to unions within very narrow limits; apparently to forbidding agreements between unions and unionized firms

to keep out unwelcome competitors and keep up both prices and wages. In 1939-40 the Department of Justice instituted a number of suits of this sort, more or less on the model of the leading case of *U. S. v. Brims*.

UNITED STATES *v.* BRIMS

Supreme Court of the United States. 1926.
272 U. S. 549; 47 Sup. Ct. 169; 71 L. Ed. 403.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court. . . .

The challenged combination and agreement related to the manufacture and installation in the City of Chicago of building material commonly known as millwork, which includes windows and door fittings, sash, baseboard, molding, cornice, etc., etc. The respondents were manufacturers of millwork in Chicago, building contractors who purchase and cause such work to be installed, and representatives of the carpenters' union whose members are employed by both manufacturers and contractors.

It appears that the respondent manufacturers found their business seriously impeded by the competition of material made by nonunion mills located outside of Illinois—mostly in Wisconsin and the South—which sold their products in the Chicago market cheaper than local manufacturers who employed union labor could afford to do. Their operations were thus abridged and they did not employ so many carpenters as otherwise they could have done.

They wished to eliminate the competition of Wisconsin and other nonunion mills which were paying lower wages and consequently could undersell them. Obviously, it would tend to bring about the

desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with the understanding that the latter would refuse to install nonunion-made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded. The local manufacturers, relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination. The nonunion mills outside of the city found their Chicago market greatly circumscribed or destroyed; the price of buildings was increased; and, as usual under such circumstances, the public paid excessive prices.

The allegations of the bill were sufficient to cover a combination like the one which some of the evidence tended to show. It is a matter of no consequence that the purpose was to shut out nonunion millwork within Illinois as well as

that made without. The crime of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well. . . .

The Chicago milk-drivers cases, of which we saw one—the *Meadowmoor* case—in the section on “secondary” action, include also a suit under the federal anti-trust laws, partly

based on the notion that the union’s attempt to unionize the “vendors” (milk wagon drivers) was an attempt to raise both wage rates and the price of milk. The federal circuit court granted an injunction against the picketing of retail stores. *Lake Valley Farm Products, Inc. v. Milk Wagon Drivers*, 108 Fed. (2d) 436 (1939), but this was voided by the Supreme Court in *Milk Wagon Drivers v. Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940).

VIII. BREACH OF COLLECTIVE CONTRACTS

American courts are far from agreeing on how to treat collective agreements,¹ whether to enforce them as they do most other contracts, and so take on a burden of interpretation which has often been successfully left to industrial arbitrators or “impartial chairmen” chosen by the two parties to the contract. Unions and their contracts are “recognized” by the courts today more than they were; on the other hand, anti-injunction laws are more likely today to be a barrier to a company securing an injunction against a union which is about to strike in violation of its agreement.² (Most agreements forbid strikes during the life of the agreement.)

Probably most collective agreements of the many that have been written since unions began were signed with no notion that the courts would be used to enforce them. It has been the unions which have been shyest of court enforcement, since they were inclined to picture it as invoked against them. But in the *Levy* case, quoted below, A. F. L. and C. I. O. joined in urging enforcement—against companies, and, presumably, against unions. The legal theory has always been that if a court punished one side for breaking a contract it would punish the other side if it broke it. Therefore the *Levy* case, against a company, is included even though the subject matter of this chapter is legal limitations on unions.

Courts which do not go to the length of recognizing union agreements sometimes give them effect when an individual employee sues, on the theory that their terms have been incorporated in the arrangements between the company and the individual employee. *Illinois Central Railroad v. Moore*, 112 Fed. (2d) 959 (1940).³ Cf. *Mansell v. Railway*, 137 S. W. (2d) 997 (Tex., 1940). Thus it has been held that the contract applies even though it was never formally signed by both sides but was only a statement of employment policy issued by the company after bargaining with the union, and even though the employee had never positively accepted the statement. *Wanhope v. The Press Co., Inc.*, 10 N. Y. Supp. (2d) 792, 256 App. Div. 433 (1939). The union, acting for the whole group, may agree to rearrange seniority in such a way as to take away the job expectations of certain members (married women, in this case). *Hartley v. Brotherhood of Railway Clerks*, 283 Mich. 201, 277 N. W. 885 (1938). If employees disregard the union scale and “kick back” part of their pay, they may not later sue to recover the kicked-back part, saying that the employer has been unjustly enriched; their arrangement, not the union’s, is superior. *Anderson v. Crystal Decorating Co.*, 6 Labor Relations Reporter 320 (Ill., 1940).⁴

When a company charges that a striking union is breaking a contract, the union very

¹ See Stein and others, *Labor Problems in America*, pp. 593-598; T. R. Witmer, “Collective Labor Agreements in the Courts,” *Yale Law Journal*, 48: 195-239, December, 1938, and material cited there.—C.R.

² But see *Unedea Credit Clothing Stores, Inc. v. Briskin*, 1 Labor Cases 1238 (N. Y., 1939) and cases cited there.—C.R.

³ Reviewed by the Supreme Court in *Moore v. Illinois Central*, March, 1941. The Court said Moore might sue even though he had not used the boards set up by the Railway Labor Act (see Chapter 4).—C.R.

⁴ But note the legislation against “kick-backs,” at the end of Chapter 7, below.—C.R.

often replies that the company broke it first and that the union is striking to enforce the contract. One legal theory is that instead the union might have gotten redress in the courts. This position is exemplified in the *Dorchy* case. Another legal approach is to take the

view that, if the company did actually break the contract first, it comes into court with unclean hands and should be granted no injunction. A variant of this idea is found in the *Sands* case, below, in which the union was, in effect, told it had unclean hands.

DORCHY *v.* KANSAS

Supreme Court of the United States. 1926.
272 U. S. 306; 47 Sup. Ct. 86; 71 L. Ed. 248.

We shall see in the next chapter that in 1920 Kansas passed a law for compulsory arbitration under a Court of Industrial Relations and that it was held unconstitutional by the Supreme Court. As part of the compulsory-arbitration plan, the law made it a felony for a union leader to call a strike. The Kansas miners' leaders, Howat and Dorchy, led the union's resistance to compulsory arbitration, and were the objects of continual prosecutions. Before compulsory arbitration was held unconstitutional, a union member claimed some back wages on the ground that, when he had become old enough to be entitled to a man's pay under the collective agreement, the company failed to raise his wage. The company said he was not that old. The union did not advise the member to take his case to court in order to prevent the company's alleged breach of the agreement. It struck. The leaders were indicted, but since the compulsory-arbitration plan had by then been held unconstitutional, it was a question whether the felony clause was automatically unconstitutional. The Kansas supreme court said, no, it was severable from the arbitration plan. The federal Supreme Court accepted this decision. But Dorchy's lawyer then claimed that the clause was unconstitutional in itself.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Section 17 of the Court of Industrial Relations Act, Laws of Kansas, 1920 . . . while reserving to the individual employee the right to quit his employment at any time, makes it unlawful to conspire "to induce others to quit their employment for

the purpose and with the intent to hinder, delay, limit or suspend the operation of" mining. Section 19 makes it a felony for an officer of a labor union wilfully to use the power or influence incident to his office to induce another person to violate any provision of the Act. Dorchy was prosecuted criminally for violating §19. The jury found him guilty through inducing a violation of §17; the trial court sentenced him to fine and imprisonment; and its judgment was affirmed by the Supreme Court of the State. . . . Dorchy duly claimed in both state courts that §19 as applied was void because it prohibits strikes; and that to do so is a denial of the liberty guaranteed by the Fourteenth Amendment. . . .

Some years prior to February 3, 1921, the George H. Mackie Fuel Company had operated a coal mine in Kansas. Its employees were members of District No. 14, United Mine Workers of America. On that day, Howat, as president, and Dorchy, as vice-president of the union, purporting to act under direction of its executive board, called a strike. So far as appears, there was no trade dispute. There had been no controversy between the company and the union over wages, hours or conditions of labor; over discipline or the discharge of an employee; concerning the observance of rules; or over the employment of non-union labor. Nor was the strike ordered as a sympathetic one in aid of others engaged in any such controversy. The order was made and the strike was

called to compel the company to pay a claim of one Mishmash for \$180. The men were told this; and they were instructed not to return to work until they should be duly advised that the claim had been paid. . . . There was . . . no evidence that the claim had been submitted to arbitration, nor of any contract requiring that it should be. The claim was disputed. It had been pending nearly two years. So far as appears, Mishmash was not in the company's employ at the time of the strike order. The men went out in obedience to the strike order; and they did not return to work until after the claim was paid, pursuant to an order of the Court of Industrial Relations. . . .

The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was

inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. . . . To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. . . . And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. . . .

Affirmed.

NATIONAL LABOR RELATIONS BOARD *v.* SANDS MANUFACTURING COMPANY

Supreme Court of the United States. 1939.
306 U. S. 332; 59 Sup. Ct. 508; 83 L. Ed. 488.

The Supreme Court gave its opinion in this case immediately after its opinions in the *Fansteel* and *Columbian* cases, which are printed below, one in Chapter 5, the other in Chapter 4. All three went against the National Labor Relations Board, almost its first setback in the Supreme Court. The Court seemed to be responding to a swing of public opinion against unionism and the Board.

In this case the union was not faced with ordinary legal penalties for breaking a contract. It had made the claim, under the National Labor Relations Act, that its members had a right to get their jobs back at the end of an unsuccessful strike; the company tried to counter this claim with the statement that the men had severed their connection with the company, not because they struck, but because they struck in violation of an existing collective agreement.

* * *

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals denied the petition of the National Labor Relations Board for enforcement of an order against the respondent and granted the respondent's petition to set aside the order. We issued the writ of certiorari because of alleged conflict.

After complaint, answer, and hearing, the Board found that the respondent, an Ohio corporation which manufactures water heaters in Cleveland, had engaged, and continued to engage, in unfair labor practices as defined by Sec. 8, subsections (1), (3), and (5) of the National Labor Relations Act [printed below], and ordered the company to cease and desist from violating those provisions and to offer reinstatement to former employes with compensation for loss of wages from September 3, 1935.

The respondent contends and the court

below held that upon the findings of fact, and the uncontradicted evidence, the Board's conclusions are without support in the record. The petitioner insists that there is evidence to support them. From the findings, and the uncontradicted evidence, these facts appear: In the spring of 1934 most of respondent's employes joined the Mechanics Educational Society of America (hereinafter called "MESA"), an independent labor organization. [This union called a strike, which was settled by an agreement, on June 15, 1935, to run till March 1, 1936. In settling on Articles 5-7 of this agreement, the union accepted a rewording by the company which confined to each separate department the employees' claims to preference in employment under the seniority system. The agreement] further provided: "In case of a misunderstanding between the management and the employees, the committee shall allow the management forty-eight hours to settle the dispute and, if then unsuccessful, the committee shall act as they see fit." . . .

. . . By the end of July . . . some departments were being operated on a part time basis and others had been practically shut down. At or about this time, the respondent wished to increase the working force in the machine shop, the key department, while at the same time shutting down the other departments. Repeated conferences were held between the management and the shop committee in reference to this matter. The positions of the respondent and the employes were diametrically opposed. The management contended that new men, experienced in machine shop work, be employed in preference to the old men. The shop committee contended that, under the agreement of June 15, 1935, the respondent could not hire any new men for the machine shop as long as old men were still laid off. The management claimed that the shop committee was insisting upon a violation of Article 5 of the agreement.

On August 19th an officer conferred with the shop committee and announced that the company would either keep the machine shop running according to the company's plan or temporarily close the plant. The committee was requested to confer with the employes and communicate their decision. After conference with the employes the committee stated that the company would not be allowed to run the machine shop unless it transferred old men in lieu of new men to that shop, and that if it did not comply with this condition it could close the plant. Accordingly, on August 21st, notice was posted that the plant would be closed until further notice.

August 26th and 27th officers of respondent negotiated with the International Association of Machinists, an affiliate of the American Federation of Labor, and, on August 31st, made a contract with that union effective September 3rd. It also recruited labor from the county relief organization. Practically all of the employes so obtained were members of the International. It offered reemployment to several of the old MESA members, as foremen, on the basis of annual employment at a lower hourly wage instead of the higher hourly wage theretofore paid them, subject to layoffs. The offer was refused. September 3rd the plant reopened. On September 4th, a representative of MESA called an officer of respondent and demanded a conference. The demand was refused on the ground that the men had been discharged. The MESA picketed the plant for about a month thereafter.

The Board held that the company had refused to bargain collectively with the representatives of its employes as required by Section 8(5) of the Act; had discriminated in regard to hire or tenure of employment and discouraged membership in a labor organization contrary to the provisions of Section 8(3); and, in violation of Section 8(1), had interfered with, restrained, and coerced its employes in the exercise of the right of self-organization,

affiliation with labor organizations and collective bargaining as guaranteed by Section 7. The Circuit Court of Appeals disagreed with these conclusions. We hold that its decision was right.

First. The petitioner urges the correctness of the ultimate conclusion that the respondent's conduct permits no reasonable inference save that the employees were locked out, discharged, and refused employment because they were members of the MESA and had engaged in concerted activities for the purpose of collective bargaining. We think the conclusion has no support in the evidence and is contrary to the entire and uncontradicted evidence of record. . . .

Second. The Board held that respondent violated the obligation imposed upon it by the statute to bargain collectively with representatives of its employees. The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made.¹ But we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning. Upon this basis the respondent was not deficient in the performance of its duty.

The contract provided for departmental seniority, in sections 5 and 6, and section 7 did not create any ambiguity on the subject. Moreover, the record makes it clear that the committee which negotiated the contract on behalf of the union fully understood its terms in the same sense as did the respondent. In this situation how often and how long was the company bound to continue discussion of the com-

mittee's demand that the provisions of the contract should be ignored? It is to be borne in mind that section 20 of the contract provided that if the company did not meet the committee's views within forty-eight hours the employees reserved full liberty of action and this meant that if the company did not accede to demands a strike might follow.

We come then to consider the situation of the respondent in August 1935. The Board has found that it desired to operate its machine shop in accordance with its honest understanding of the contract. Its motive, whether efficiency or economy, was proper. It had stated its views to the committee. The committee was adamant; its stand was that the company could close its entire plant if it chose, but it could not operate the machine shop in accordance with the provisions of the contract. If it attempted the latter alternative a strike was inevitable. The Board found that it was inconceivable that the employees would have accepted the company's construction of the contract even if they had been threatened with discharge at the time. It is evident that the respondent realized that it had no alternative but to operate the plant in the way the men dictated, in the teeth of the agreement, or keep it closed entirely, or have a strike. When the representatives of the two parties separated on August 21, no further negotiations were pending, each had rejected the other's proposal and there were no arrangements for a further meeting. On the following days the factory was closed.

The Board finds that, in this situation, the respondent was under an obligation to send for the shop committee and again to reason with its members or to wait until the situation became such that it could operate its whole plant without antagonizing the employees' views with respect to departmental seniority. We think it was under no obligation to do any of these things. There is no suggestion that there was a refusal to bargain on August 21st.

¹ Report No. 573 of Senate Committee on Education and Labor, 74th Cong., 1st Sess., p. 12.

There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employees. No such request was made prior to September 4th. Respondent rightly understood that the men were irrevocably committed not to work in accordance with their contract. It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer. As the respondent had lawfully secured others to fill the places of the former employees and recognized a new union, which, so far as appears, represented a majority of the employees, the old union and its shop committee were no longer in a position on September 4th to demand collective bargaining on behalf of the company's employees. . . .

Third. Certain occurrences subsequent to August 21, 1935, are urged by the Board in support of its finding that respondent's discharge of its forty-eight employees constituted discrimination against the union and failure to bargain collectively. The first of these is its application to the International Association for men and its mak-

ing an agreement with that union on August 26th and 27th. If, as we have held, the respondent was confronted with a concerted refusal on the part of MESA to permit its members to perform their contract there was nothing unlawful in the company's attempting to procure others to fill their places. If the respondent was at liberty to hire new employees it was equally at liberty to make a contract with a union for their services.

The offering of re-employment to four of the old employees, upon a new and different basis, is said to constitute discrimination against MESA, but the answer is that if the whole body of employees had been lawfully discharged the law does not prohibit the making of individual contracts with men whose prior relations had thereby been severed. . . .

* * * *

Mr. Justice Black and Mr. Justice Reed dissented without writing an opinion, but their views can be seen in their dissents in the immediately preceding *Fansteel* and *Columbian* cases, especially the latter, since there too it was partly a question of whether the union had broken an agreement (see the quotation from the *Columbian* case in the next chapter).

One view of the *Sands* case might be that the "48 hour" clause meant that, as long as the union gave the company 48 hours notice, a strike was not a violation of the agreement, but rather served to abrogate the agreement.

LEVY v. THE SUPERIOR COURT

Supreme Court of California. 1940.

—Cal.—; 104 Pac. (2d) 770.

We have noticed that an arbitrator may take the place of the courts in interpreting and enforcing the agreement. An association of employers may stand back of the arbitrator's decision, if an employer is unwilling to obey it; the union stands back of it if employees are unwilling to obey it. In addition to these minor arbitration cases, there are situations in which the parties cannot agree on a

new contract and leave some of the terms to an arbitrator. His decision in effect creates the new contract. Presumably a court which thought labor contracts should be enforced would enforce contracts arrived at through arbitration as well as others, and would stand back of minor, interpretative arbitration decisions, too.

* * * *

SHENK, Justice.

This proceeding in mandamus presents the question whether the provisions of Title X of Part 3 of the Code of Civil Procedure apply to an arbitration award made pursuant to a collective bargaining agreement.

On November 3, 1939, a collective bargaining agreement was entered into between David Shann Corporation, women's garment manufacturer, as the employer, called the firm, and International Ladies' Garment Workers' Union, called the union, acting on behalf of all its members. Prior to that date and in August, 1939, a labor dispute arose between the union and the firm with reference to working conditions. A strike ensued, which was called by the union. A settlement of that dispute and strike resulted in the agreement of November 3rd, which named the International Ladies' Garment Workers' Union as the sole collective bargaining agent for all production employees. The union agreed to terminate the strike called on August 22, 1939, and to cease all activities in connection with a secondary boycott. The firm agreed to rehire all former union employees who were out on strike. The agreement permitted retention by the firm of certain non-union workers, and provided that all workers then members of the union and all thereafter to be employed must be and remain members of the union. The firm agreed to call upon the union for and the union agreed to supply all future workers required. The agreement contained provisions for maintaining hour, day, wage, piece work and garment price schedules, and divisions of labor between union and non-union workers. The contract was to be in force until June 30, 1941, the parties agreeing that in the meantime there would be no strike, lockout, walkout, shop strike, or shop stoppage for any reason or cause whatsoever, and the union agreed to refrain from printing or distributing any matter which might cause damage to the

firm. Both parties named Anthony G. O'Rourke as impartial chairman and final arbitrator to whom all complaints, controversies, questions of interpretation of the agreement, and all other differences of the parties should be heard and determined if the parties could not in the first instance dispose of the matter. It was provided that the decision of the arbitrator should be final and binding upon the parties to the agreement, and that the expenses and fees of arbitration should be shared equally by the parties. Special provisions called for the return to work of certain named persons who were members of the union, the retention as employees of certain named workers who were not members of the union, the number of each group being about equal, and for the equal division of work among employees union and non-union. A general provision of the agreement, designated as number 10, reads: "During such times as the firm is unable to provide full time work for the workers of the shop, the work shall be equally divided, without favoritism, and as nearly uniform as is possible."

During the strike the firm was employing approximately thirty non-union workers. When the striking union workers reported back to work following the execution of the agreement the firm insisted on retaining 12 non-union workers and re-employing only 3 union workers. A dispute immediately arose, which was heard by the arbitrator, who rendered his decision that pursuant to paragraph 10 of the agreement above quoted the firm should divide the available work by employing one union worker for each non-union worker, and continue so to divide the work without favoritism during slack times.

On November 14, 1939, further charges of favoritism to non-union workers and discrimination against union members were made and a hearing therein was had before the arbitrator on the day following. On November 22, 1939, he made his find-

ings and his decision to the effect that the firm should re-employ, on an equal basis with other workers, nine union members who were some of those specifically named in the agreement as workers whom the firm would so re-employ. The arbitrator also found the firm guilty of discrimination against union workers and of favoritism toward non-union workers in the enforcement of regulations relating to working conditions. He made his award directing correction of the conditions without favoritism and stating that, if the firm failed to report within a specified time that such conditions had been corrected, it would "be his unpleasant duty to declare the firm in breach of its contract."

The award of the arbitrator dated November 22, 1939, incorporating the prior award, was duly acknowledged and filed on November 30, 1939, in the Superior Court in Los Angeles County, in proceeding numbered 447044, together with the petition of the union for an order confirming the award of the arbitrator pursuant to section 1287 of the Code of Civil Procedure. Notice in writing was duly served on David Shann Corporation, the defendant in said proceeding. The defendant filed a demurrer upon the principal ground that the superior court was without jurisdiction because the award was made under a contract "pertaining to labor," which by the proviso of section 1280 of the Code of Civil Procedure was excepted from the operation of the arbitration statute, consisting of sections 1280 et seq. of that Code. The superior court sustained the demurrer solely on the ground that the collective bargaining agreement involved was a contract "pertaining to labor," and as such was not a contract of arbitration which could be enforced pursuant to the provisions of the Code of Civil Procedure. This proceeding in mandamus followed, wherein the union seeks to have the respondent court directed to entertain jurisdiction of the petition to

confirm the award, and of the motion to vacate the award made on other grounds by the corporation.

. . . The petitioner is aided by briefs amici curiae representing the California State Federation of Labor (A. F. of L.) and by the Los Angeles Industrial Union Council (C. I. O.). . . .

Part 3, Title X, . . . Section 1280 provides that a provision in a written contract to settle by arbitration a dispute which may thereafter arise out of the contract, or to submit to arbitration an existing controversy, is valid, enforceable and irrevocable except on grounds existing at law or in equity for the revocation of contracts, with the proviso that "the provisions of this title shall not apply to contracts pertaining to labor." Other provisions of the Title are that within three months after an award is duly made by an arbitrator under a valid agreement to submit a dispute to arbitration, any party to the arbitration may apply to the superior court for an order confirming the award and such court is directed to grant the order of confirmation (section 1287), unless it is vacated, modified, or corrected as prescribed by sections 1288 or 1289. By section 1291 judgment may be entered upon the confirmation of the original award, or as modified or corrected. The judgment so entered has the same force and effect as a judgment rendered in an action and it may be enforced as if it had been rendered in an action in the court in which it was entered (section 1292), and an appeal may be taken therefrom (section 1293).

The petitioning union contends that a collective bargaining agreement is not a contract pertaining to labor within the proviso of section 1280 of the Code of Civil Procedure; that a contract pertaining to labor within the meaning of that section is one for the performance of manual labor and payment therefor, made between the worker and his employer; that the collective bargaining agreement

is not such a contract, but is one entered into on the one hand by the bargaining agent or trade union and, on the other, by the employer, not for performance of labor and payment therefor, but to settle the working conditions of union members who may be hired by the employer, the character of the shop, whether "closed" or otherwise, and to establish wage and hour standards. Such a contract usually provides against lockouts, strikes called by the union against the employer during the period of the contract, and secondary boycott activities. The contract also customarily contains provisions to submit any dispute arising out of the contract to a named arbitrator and for the finality and binding effect of the settlement by the arbitrator of any dispute submitted to him.

The respondents' view is that the word "labor" in connection with the applicability of the arbitration statute should be interpreted in its broadest sense; that is, if in any aspect the contract pertains to "labor" the court should consider that it is excluded by the proviso in said section 1280; that the present case involves such a contract; and that the Legislature intended by the proviso to restrict the statute to arbitration of commercial disputes, as distinguished from industrial disputes. . . .

[The Legislature later defined "labor" as] "labor, work, or service whether rendered or performed under contract, sub-contract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment." That definition plainly indicates that a contract pertaining to labor means a promise to perform labor and a promise to pay therefor a stipulated price. The elements involved in that definition are absent from a collective bargaining agreement, which is distinct and separable from a contract of hiring. The function of the collective bargaining agreement is to lay down the relative duties or

obligations to be observed between the employer and the union, and itself contemplates that the contract of hiring shall be a distinct and separate transaction.

Prior to 1927 the provisions of the Code of Civil Procedure permitted parties to submit to arbitration only existing controversies (except specified questions relating to real property) which might be the subject of a civil action between them; and while the submission to arbitration remained executory and there was no stipulation that it be entered as an order of court, it was revocable by either party. . . . The former provisions were based upon a public policy then existing which was averse to permitting parties to deprive themselves of their right of resort to the courts.

In 1927 (Stats. 1927, p. 404), the Legislature added sections 1280 and 1291-1293 to the Code of Civil Procedure, and enlarged the provisions of the remaining sections of Title X, Part 3, to encompass a procedure for enforcement of awards under voluntary arbitration agreements. The statute has been held to be constitutional (*Pacific Ind. Co. v. Ins. Co. of N. A.*, 25 Fed. 2d 930) and no question of its constitutionality is here involved. There was undoubtedly a basic reason for excluding labor agreements. A contract to perform labor is not specifically enforceable, with certain exceptions not pertinent here. (Section 526 (5) Code of Civil Procedure; section 3390, 3423 (5) Civil Code.) The same considerations pertaining to the personal relations between employer and employee would indicate that contracts between them should not be subject to the provisions of the arbitration Title in the Code of Civil Procedure. But the considerations which would except contracts to perform labor from such proceedings do not exclude collective bargaining agreements. . . . Voluntary collective bargaining agreements, including awards made under arbitration provisions therein, have been held to be specifically enforceable.

Harper v. Local Union No. 520 [Texas Court of Civ. App.], 1932), 48 S. W. (2d) 1033; *Kaplan v. Bargier*, 12 Pa. Dist. and Co. Rep. 697; *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279, and cases cited; *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N. Y. Supp. 401; *Goldman v. Cohen*, 222 App. Div. 631, 227 N. Y. Supp. 331; *Ribner v. Rasco Butter and Egg Co., Inc.*, 135 Misc. 616, 238 N. Y. Supp. 132; *Farulla v. Ralph A. Freundlich, Inc.*, 152 Misc. 761, 274 N. Y. Supp. 70. [But see *Goldstein v. International Ladies' Garment Workers' Union*, 328 Pa. 385.]

In *Harper v. Local Union No. 520*, *supra*, the Court held that mutuality of remedy for equitable relief by injunction existed under a collective bargaining agreement because the agreement in its collective aspect is not one for personal service.

In *Schlesinger v. Quinto*, *supra*, (decided in 1922) the Court observed:

"The cases thus far decided have been at the suit of the employer against combinations of labor, for the simple reason that this is the first time that labor has appealed to the courts . . . The remedies are mutual; the law does not have one rule, for the employer and another for the employee."

In *Goldman v. Cohen*, *supra*, decided in 1928, the court said:

"Usually in the past it has been the employer who has sought the help of the courts for the protection of his rights, but obviously the same principles of law apply equally to both employer and labor union. Where a strike is threatened by a labor union in violation of its contract with an employer, the right of a court of equity to issue an injunction to prevent such contractual violation is well settled . . . Likewise, where an employer is threatening to order a lockout of his employees in violation of his contract with the labor union in behalf of the employees, the right of a court of equity to prevent such contractual violation is necessarily measured by the same principle . . . If the union has not the right to invoke the aid of a court of equity to prevent the unlawful violation of a contract such as exists in the case at bar, then such a contract loses most of its force, and the rights

of collective bargaining are narrowed and the economic benefits to the community from collective bargaining to a great extent lost."

In the same vein, in the case of *Ribner v. Rasco Butter & Egg Co.*, *supra*, the Court said:

" . . . the right of a labor union to enforce the terms of a lawful contract such as exists between the parties in the instant case should not be determined by the character of the services to be performed by the members of the union, but should rest upon the mutual rights and obligations of the parties under their contract. It is well settled that an employer may avail himself of the relief afforded by a court of equity to enforce his rights under such a contract with a labor union. Conversely the union should be afforded reciprocal relief to enforce its rights under the contract with the employer . . . To deny to the plaintiff union the right to invoke the aid of a court of equity to prevent an unlawful violation of its contract, it must necessarily follow that the right of collective bargaining will be seriously impaired, leaving the labor union to resort solely to strikes and picketing which would entail, not only serious financial loss, but also protracted and needless friction and possible breaches of the public peace and security. It is fitting that industrial struggles be settled by modern methods of procedure as now laid down by the courts. . . .

Our conclusion that the arbitrator's award pursuant to the terms of a voluntary collective bargaining agreement is enforceable and that it was not the legislative intent to exclude such contracts from the provisions of section 1280 of the Code of Civil Procedure, is in harmony with legislative declarations. In the Labor Code adopted in 1937, by section 923 thereof, the Legislature declared the public policy of the State with reference to labor organizations as follows:

"Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and therefore to obtain acceptable terms and conditions

of employment. Therefore, it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

This declaration evidences the existence of a policy to uphold the freedom of employees to organize and to enter into collective bargaining contracts for their own protection. This policy had previously been declared in 1933 (Stats. 1933, p. 1478). Again, in 1939 (Stats. 1939, p. 2368), the Legislature added section 65 to the Labor Code, which vested in the department of industrial relations power to investigate labor disputes and mediate, arbitrate, or arrange for the selection of boards of arbitration, providing all bona fide parties to such disputes join in a request for intervention by the department. It would be difficult to uphold such a policy without recognizing the right of enforcement of collective bargaining contracts when voluntarily entered into by the unions.

It is further brought to our attention that arbitration under collective bargaining agreements has been one of the most potent factors in establishing and maintaining peace and protection in industry (see *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 17 Oregon Law Review, pp. 263-288); and that organized labor is more and more resorting to the courts for recognition of the lawfulness and enforceability of collective bargaining agreements, rather than electing to settle its disputes by other methods. (See 44 Harvard Law Rev., pp. 601-608; 51 Har. Law Rev., pp. 520-533; see also reports of Standing Committee on Commerce, Trade and Commercial Law, Vol. 51 Reports of Am. Bar

Assn., 394 et seq.; and Vol. 53 [the same] 351-372.) . . .

Lastly, the respondents point out that the contract and the award here involved provide that the corporation should re-employ certain specified union members who had been regular employees of the corporation prior to the inception of the dispute. They contend that because of those provisions the considerations are present which exclude from specific enforcement contracts to perform labor or personal services, and which therefore designate this collective bargaining agreement as a contract pertaining to labor.

We do not agree that the possible effect of any confirmation which the court may grant will be to enforce specifically a contract or award for the performance of labor. Courts have enjoined the discharge of union workers, where there was no dispute as to their competency, and the employment of non-union workers in their stead, in violation of collective bargaining agreements. (Note, 51 Har. Law Rev., p. 526, citing *Harper v. Local Union No. 520*, *supra*; *Ribner v. Racso Butter & Egg Co.*, *supra*, and other cases. See also Comment in 19 Cal. Law Rev. at p. 192.) The present collective bargaining agreement and the award contemplate that the wage to be paid the worker is a matter for adjustment between him and the employer, subject to certain standards; that there shall be no compulsion insofar as either is concerned—the worker may quit his job, and the employer may discharge him for cause. If the employer, therefore, under his contract with the union may be compelled to employ an ascertainable number of union members so long as the agreement subsists and he remains in business—and the decisions herein cited so indicate—then there can be no objection to the contract or the award merely because such workers are designated by name. No distinction can be accorded such a contract or award because it happens to name the particular

workers when, if unnamed, the employer would be compelled to accept the same workers. Any showing which may be made that they are unacceptable because incompetent is not a question going to the jurisdiction of the court.

It follows from what we have said that the respondent superior court has jurisdiction to entertain the proceeding before it and that the alternative writ of mandate heretofore issued herein should be made peremptory.

It is ordered that the peremptory writ issue accordingly.

In *Amsterdam Dispatch, Inc. v. Devery*, 278 N. Y. 218 (1938), the company wanted to compel the union to arbitrate the terms of a new contract, since the old contract obligated the union to "arbitrate." The court held, however, that "arbitrate" meant only to arbitrate disagreements about the meaning of the old agreement and refused. In 1940 the New York legislature passed a law to make such clauses enforceable.

In *U. S. Trucking Corp. v. Devery*, 8 Labor Relations Reporter 142 (New York,

1941), it was held that the company could sue to apply the arbitration clause in its contract even though the union, by striking, had forced it to agree to new terms without arbitrating.

The New York City milk drivers made a no-strike agreement with the Sheffield dairy company, with a clause for arbitration by the new impartial chairman of the milk industry. A strike occurred in protest against the discharge of members who had refused to stack milk-bottle cases high because it was hazardous. The chairman ordered the men reinstated, but fined the union \$10,000, and when the union did not pay this order was endorsed by the state courts, in 1940.

We saw earlier that sympathy strikers were likely to be blamed for breaking their contracts. We shall see in the next chapter that Congress, in its 1926 Railway Labor Act, provided that arbitration awards were to be enforceable in court (though other contracts were not treated the same way); and in its rewriting of that law in 1934 provided a special sort of compulsory arbitration by "adjustment boards," to enforce arbitration-made contracts and all other collective agreements on the railroads, and also to settle minor grievance cases which arise outside the collective labor contracts.

CHAPTER FOUR

MEDIATION, ARBITRATION, AND ESSENTIAL INDUSTRIES

Though it is uncertain, except in times of great business activity, whether total yearly production is substantially reduced by strikes, yet strikes are costly to the particular employers and employees involved and may be some trouble to the public. When a new wave of industrial disputes occurs, there is always renewed interest in a remedy. There is an increase in repressive measures such as are described in the first three chapters. Often compulsory arbitration is suggested. Sometimes emphasis is put on diplomacy, that is to say on negotiation; under it the strong will, of course, get more than the weak, but strike-unemployment will be avoided. Negotiators do not usually need mediation by an outsider. But sometimes mediation will get negotiating going; it may even provide the slightly different, somewhat face-saving formula which will settle the dispute for a year or so; it may help lead the parties to voluntary arbitration, if the deadlock cannot be broken in any other way. On the other hand, it may fail and a strike will occur.

Negotiation, mediation, arbitration—these three make up the conciliation complex.¹ They are aspects of industrial government and they exist independently of political government. But the interest of persons in political government in keeping the industrial peace leads governmental agencies to foster conciliation of various sorts. It is the governmental impetuses to conciliation that are studied in this chapter.

Whenever government enters the picture, one suspects that it may turn out to be more than a mere go-between; that it will, even if indirectly, put pressure on one party (or both parties) to reduce the terms for which it has been holding out. If an important official in-

tervenes himself, one or both sides may fear to offend him. Again, mediation may be of the sort which leads to official public statements which imply that one side is at fault, and that side is disadvantaged by the resulting public opinion. Even the threat of this publicity may lead it to offer different terms.

Mediators usually avoid such announcements, but ever since the first state mediation boards were set up in the 1880's, publicity has been one of the weapons stored in the government arsenal; this is illustrated by "Mediation in Public," below. Even before the 1880's there had begun one type of publicity-intervention—that is, the legislative investigation. In 1916 Colorado formalized the publicity-mediation method when it passed a law requiring disputes in essential industries, including coal mining,² to be submitted to the Industrial Commission if a strike threatened. The Commission was to recommend a settlement; suspensions of work were forbidden during the cooling-off period. This formula, borrowed from Canada,³ might be described as semi-compulsory arbitration—compulsory submission of the dispute to an official arbitrating body, but (legally speaking) voluntary decision by the parties as to whether to accept the "award." Publicity is the only enforcing device.

² The occasion for the law's passage was the coal strike and "Ludlow massacre" of 1913-14. The Colorado supreme court upheld its application to coal mines in *People v. United Mine Workers*, 70 Colo. 269 (1921), but in 1935 the court implied that perhaps only public utilities were covered (or could constitutionally be covered). It did so in an opinion holding that theaters were not "affected with a public interest." *People ex rel. Industrial Commission v. Aladdin Theater Corporation*, 96 Colo. 527 (1935).—C.R.

³ See Ben Selekmán, *Law and Labor Relations: A Study of the Industrial Disputes Investigation Act of Canada* (Cambridge, Harvard Graduate School of Business Administration, 1936).—C.R.

¹ See also Stein and others, *Labor Problems in America*, pp. 642-44.—C.R.

In 1926 a similar plan was agreed on by the railroad unions and railroad managements and then enacted by Congress for the railroad industry (see below). A cooling-off period and unpublicized mediation were provided for; if a real interruption threatened, an emergency investigation board would consider the dispute and publish its findings. In 1939, among a number of state statutes passed to limit unions or to reduce the number of strikes, several adopted these two devices, especially Minnesota and Michigan (see below). At the same time there were suggestions that Congress adopt it for the maritime industry (see below). In 1940, when defense industries became important, the same formula was brought forward as one likely to avoid strikes if applied to those industries (see below). It was predicted that neither side would be likely to reject the award of an official investigating commission.

To the extent that the parties would not feel free to reject it, to that extent the system would be, not semi-compulsory, but compulsory arbitration—that is, the parties would be compelled both to submit to a board and to accept the board's decision. It might be called compulsory arbitration even if, as some suggested, Congress enacted no law, but the unions and managements of the defense industries volunteered to submit to such a plan. Thus it is probably correct to call the work of the National War Labor Board of 1918 compulsory arbitration; not Congress but circumstances compelled the parties to accept it—plus the big stick in the corner, brought out in the Bridgeport case (see below).

A less pressing issue is that of another sort of half-compulsion which may be associated

with the practice of arbitration—not compulsory submission but compulsory acceptance of an award in case the parties have voluntarily entered on arbitration. A similar question is whether the state will force the parties to arbitrate their differences when an agreement expires if there is an arbitration clause in the agreement. These issues are all in the general field of whether collective agreements will be treated somewhat like contracts—whether the courts will interpret and enforce them when the parties disagree (a subject dealt with in the previous chapter).

The restrictions on economic freedom involved in the mediation-investigation or semi-compulsory arbitration outlined above are usually proposed or instituted for industries whose continuity is thought essential to public welfare.⁴ This chapter considers the general problem of continuity in several essential industries. It also takes up a special sort of government intervention aimed to make limits on striking palatable to railroad unionists and to war-industry unionists—namely, a rule calling on employers to recognize unions and not discriminate against their members. In the next chapter we shall see that the National Labor Relations Act undertook to extend this special sort of government intervention to most industries, whether essential or not, apparently without any intention to impose parallel restrictions on the use of the strike.⁵

⁴ We shall see that the Minnesota and Michigan statutes apply them more generally, but with special force in essential industries.—C.R.

⁵ The law cases quoted in the present chapter deal with some of these functions of the National Labor Relations Board, or with very similar matters.—C.R.

I. MEDIATION AND ARBITRATION

Every industry is subject to frictions which may prevent union leaders and management from talking over their conflicting claims with complete calm. If hostility does develop, a mediator may well be helpful. Even when negotiations are friendly, he may bring a fresh approach to the problem being discussed. Mediation is most important in cases in which the union has not won clear recognition and the parties are not used to collective bargaining. The mediator may be able to bring together people who are suspicious

of each other. When collective bargaining is well established, mediation of this sort is no longer needed.

The mediator may be a private or a public person. In a typical situation today a governmental mediation bureau will offer the services of one of its members. In many cases the bureau acts on an indirect request from one of the parties to a conflict; the request is likely to be indirect because a direct request may indicate weakness. Sometimes both sides ask the advice of the bureau or of one of its

mediators whom they know, or the bureau may volunteer to help. In important disputes, the governor or some other prominent public official may intervene. Sometimes an outside businessman or a clergyman will try to bring the disputants into conference.

Mediation is usually a private process. When, occasionally, it is not, it borders on the compulsory investigation procedure which is considered in a later section. An illustration of public mediation is given just below.

Arbitration is, in a sense, an extension of mediation. A third party is called in when the disputants cannot agree and, like the mediator, this arbitrator sizes up the situation and proposes a solution, usually a compromise solution. Of course there is somewhat greater moral obligation on the parties to accept the arbitrator's solution than there is in the case of a mediator's suggestion; and we saw in the previous chapter that his award is sometimes legally enforceable as a collective contract.

The sizing up of the situation involves estimating the economic strength of the two sides. Their strength depends on how many employees the union could get out if it called a strike, and how long it could keep them out; on how much money the employer is making and, therefore, how anxious he is to keep operating, and on whether he can hire strikebreaking workers or get his orders filled by another company. If the mediator sizes the situation up about as the others do, they can all agree on a solution that gives each side about what it would have won if there had been a strike—without the trouble for each that a strike would have entailed. If one side disagrees with the mediator (even if mistakenly), the suspension of work will take place.

If the matter is entrusted to an arbitrator, even though one of the sides does not think the arbitrator's award gives them what they could have got as the result of a trial of strength—a strike—yet they are unlikely to repudiate the award. They will probably wait till the award or contract expires and then insist on a trial of strength (unless business conditions have changed meanwhile).

Needless to say, it is usually very hard for a mediator or arbitrator to estimate how a strike would result—there are many unpredictable elements in a strike. Besides that, he

may be dealing with a situation complicated in other ways; the contract under discussion is likely to contain many provisions, of which more than one is likely to be under consideration, and the outsider may well know very little—at first—about the customs of the trade and the importance of different claims and devices.

A special sort of arbitration is the arbitration of minor disputes; this might be called grievance arbitration. It is usually found in industries in which there are elaborate collective contracts. Most grievances, usually involving one or only a few employees, can be related in some way to the terms of the contract, so the general picture of a grievance arbitrator (or "impartial chairman") is that he interprets the contract, many of the provisions of which run in general terms which the two sides interpret differently. Usually he does not have to think of the relative economic strength of the two sides, but instead tries to say what the parties probably meant when they signed the agreement, to decide according to the custom of the industry, or at least to cut the knot and get the thing settled so that work can go on.

In an industry with many small disputes, an impartial chairman may be appointed to hold office for several years, and his job may even be a full-time one. In contrast, arbitration which helps renew an agreement comes perhaps once every few years and is less likely to involve the same person as arbitrator—partly because, if one side is disappointed in an award, it will veto the man's name if it is proposed the next time.

It is rarely suggested that a grievance award be taken to court; rather, the impartial chairman is thought of as a special, private court (without appeal).¹

The two main articles reprinted here are general discussions, one descriptive, the other analytical. They are preceded and followed by two concrete cases of mediation—in only one of which the parties were brought together. In the other we find a consideration of the question of how nearly it is a company's duty to sit down to negotiate with a union.

¹ The peculiar nature of the "adjustment" machinery on the railroads and the possibility of taking its decisions to court are considered in a later section of this chapter.—C.R.

MEDIATION IN PUBLIC

John Mitchell, former head of the United Mine Workers, in 1915 became chairman of the New York industrial commission; one of his duties was to act as conciliator in strikes. Once he went to an industrial town in northern New York, where a strike had been going on for some time. The employers of the town had formed an association during the strike; they refused to meet with the representatives of the strikers, who were "the foreign element" in the town. It was rumored that the men were desperate and that dynamite was stored in town. Though it was the vacation month, Mitchell summoned the commission to make the required investigation. The story is reported by Elsie Glück in the words of one of Mitchell's colleagues.

* * *

"The day of the proceedings was hot and sultry. Everyone was irritated and tense, as worker after worker was called and gave the same desperate story, and employer after employer refused, on advice of counsel, to give his version of the strike. Mr. Mitchell, slow, deliberate, was in the chair and he seemed to be the only one who could keep his temper. Even those commissioners who were supposed to be friendly to the manufacturers' side had become incensed at the attitude of the employers.

"Finally one of the younger employers was called to the stand. I sent word to Mr. Mitchell that this was the only man in the employers' group in whom I had any hope. Mr. Mitchell proceeded with the regular questions. What was the man's name, his firm's name, how long had he been in business, the number of his employees, etc.

"When he came to the question: 'Will

you tell us what you know of this strike?' he received the same irritating answer: 'On advice of counsel I have nothing to say.' The case seemed hopeless.

"At this moment, Mr. Mitchell asked the witness, 'Are you a member of the same association as Mr. — (an employer who had gone to Canada to avoid examination)?' He received an answer in the affirmative. Then Mr. Mitchell, slowly, dramatically, deliberately and earnestly said, 'I am going now to perform a most unpleasant duty but one which I believe necessary under the circumstances.'

"Then he read into the record a letter from Mr. —, the absent employer, obscene and vituperative, in response to a request from a committee of his workers to meet with them. The whole matter took but a few moments, but it seemed longer because of Mr. Mitchell's low, deliberate reading. The air was very tense in that sweltering hot room and there was hardly a sound until the witness cried out: 'My God, I can't stand it any longer. I've always been respected in the community, respected by my employees. I've lived here all my life and I'm sick to death of all this.'

"I leaned forward and urged Mr. Mitchell to take advantage of the opening made. But to the surprise and dismay of the other commissioners, Mr. Mitchell adjourned the hearing at the moment for the next day without further explanations. Next morning there came a committee from the employers to meet with the workers' committee and eventually a settlement was made.

"It was a dramatic episode—spontaneously dramatic. Only a good man, himself clean, would have known how to appeal to the decency of the man on the witness stand."

¹ Elsie Glück, *John Mitchell, Miner: Labor's Bargain with the Gilded Age* (New York: The John Day Company, 1929), pp. 250–52. Used by permission.—C.R.

THE WORK OF THE MEDIATION BOARD OF NEW YORK STATE ¹

A more general acceptance by management and labor of the idea and process of mediation, has facilitated the work of the New York State Board of Mediation during the year 1939. There has been a progressive increase in the number of cases in which the board has been asked either by the employer or by the union to intervene in an existing dispute and to aid in effecting a peaceful adjustment of the differences by mediation. There is evidence that the initial experiences of employers (individuals or groups) and of labor organizations with the methods applied by the board, has led them to return to the board when confronted with new problems; and that the board is increasingly recognized as a valuable medium for the rational settlement of differences which threaten loss of employment to the workers and loss of profit to the employers. The experience during the year has been such as to encourage and confirm the thought that there should be no occasion for interruption of work by strike or lockout anywhere in the State until after the parties to the dispute have voluntarily applied to and appeared before the Mediation Board.

The encouraging growth of mediation in industrial disputes in this State runs parallel to an apparent nation-wide trend toward mediation and conciliation.

Thirty-three states now have legislation relating to mediation and conciliation, and during the last year the legislatures in six states defined and enlarged their mediation activities. One of the most striking differences discernible between 1938 (the last complete year for which such figures are available) and the preceding year in the methods of strike settle-

ment lies in the increase in the proportion of disputes settled by government mediation agencies. Over the entire country, the proportion of strikes settled by mediation increased from 36 per cent in 1937 to 42 per cent in 1938. There was a corresponding decrease of disputes settled by unaided negotiations between employers and labor organizations.

The past year has also been marked by the growth of the practice, now nearly general in this State, of naming an appointee of the New York State Board of Mediation in labor contracts as the impartial arbitrator of disputes which may arise between the parties during the term of the agreement. . . .

The act creating the Mediation Board states that "the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes; that . . . industrial strife . . . is productive ultimately of economic waste; that the interests and rights of the consumers and people of the state . . . should always be considered and respected . . . ; and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the . . . welfare . . . and safety of the people of the state."

To carry out this policy the board is invested with certain powers and duties. "Upon its own motion, in an existing . . . or threatened labor dispute, the board may and, upon the direction of the governor, the board must take such steps as it may deem expedient to effect a voluntary, amicable and expeditious adjustment . . . of the differences . . . between the employer and employees. . . ."

The act sets forth specific steps which it is the duty of the board to follow in attempting to effect a settlement:

¹ New York State, Board of Mediation, *Third Annual Report, for the Twelve Months Ending December 31, 1939* (New York: New York State Board of Mediation, 1940), pp. 3-14.—C.R.

(1) To arrange for and hold a conference between the disputants.

(2) To invite the disputants to attend such a conference and submit, either orally or in writing, the grievances of and differences between the disputants.

(3) To discuss such grievances and differences with the disputants.

(4) To assist in negotiating and drafting agreements for the adjustment in settlement of such grievances and differences and for the termination or avoidance of the existing or threatened labor dispute.

In performing the above duties the board acts entirely in a voluntary capacity. It has no power to compel the attendance of the disputants at conferences or to legally enforce any of its suggestions or recommendations. The act states that "the board and . . . each person designated thereby shall have power to hold public or private hearings at any place within the state, subpoena witnesses and compel their attendance, administer oaths, take testimony and receive evidence. . . ."

This power to subpoena witnesses is possessed by the board only after the disputants have voluntarily submitted to mediation. It is available merely to facilitate the examination of any factual questions that may arise during the progress of a mediation procedure which has been voluntarily initiated. Thus far in its history the board has never found it necessary to compel the attendances of witnesses during a mediation procedure. And with the exception of a very few isolated instances, disputants have not refused the board's invitation to appear before and submit the existing grievances or differences to open discussion. There have, however, been many cases in which the board had no notice of the dispute until after interruption of work had occurred and in which it became apparent that an earlier appeal to the mediation procedure would have averted the interruption.

The services of the board are available at

any stage of a labor dispute. The fact that action may be pending before the National or State Labor Relations Boards, does not prevent effort on the part of the Board of Mediation to effect a settlement on points other than the legal issues involved.

The voluntary character of the board's functions—there are no laws to enforce, no arbitrary authority, and no orders to issue—accounts in no small degree for such success as the board has achieved in the peaceful settlement of industrial disputes. The board works on the theory that disputes settled by the parties themselves are more realistically settled and leave less bitterness in their wake than those forced by any authority however wise and benign—there are two sides to every question and that both parties may properly be expected to fight for what they consider fair and necessary—and that the best solution will be found by reasonable examination of the situation from all points of views. The ultimate goal is to establish mutual confidence and good will between management and labor, co-operating under collective agreements.

It is impossible to outline in detail the procedure of the board in the cases handled by it. No set rule can be laid down as a method to be pursued by mediators in labor disputes, as much depends upon the personalities involved, and upon the facts and nature of the particular dispute, and more than a little upon the predilection of the individual mediator. Broadly the mediator may follow five main distinguishing steps:

(1) To ascertain the facts of the controversy.

(2) To discover the exact positions of the respective parties to the dispute—positions not always confided to the adverse side.

(3) To create an atmosphere conducive to rational discussion.

(4) To stimulate the imagination to an

understanding of the adversary's problems.

(5) To suggest new solutions or compromises to which both parties can agree.

The method usually followed by the board, when knowledge is obtained (from union, employer, employees, or on its own initiative) of an existing or imminent labor dispute, is to communicate with both parties to the dispute and explain the purpose and procedure of the Board of Mediation; and to then invite the disputants to meet with a member of the board for a discussion of the matter. After discussing the controversy with each side separately, if the dispute is then found to be one which may lend itself to adjustment through mediation, a joint meeting is called. The mediator, after both parties have stated their positions in the joint meeting, then attempts to aid the disputants to compose their differences. This may be accomplished by one or more of the following methods:

(1) By holding one or more joint conferences in which the issues are clarified and possible basis of settlement are explored.

(2) By acting as the negotiator and holding separate conferences with the disputants.

(3) By the mediator drawing upon his knowledge of trade agreements and collective bargaining and developing a plan for the settlement of the particular dispute.

(4) By the mediator drafting a plan for the settlement of the dispute and submitting it simultaneously to the disputants, with the recommendation that it be used as the basis of a compromise settlement.

(5) By recommending that the entire matter, or that portion of the dispute still unsettled, be submitted for arbitration to a person or persons selected either jointly by the disputants or by the board.

(6) If disputed facts make a settlement impossible, by requesting the Industrial Commissioner to appoint a special fact-finding committee to investigate and

make public the facts of the controversy.

This final step which the board can take in the event efforts at mediation fail, is to forward a recommendation to the Industrial Commissioner for the appointment of a special fact-finding body which by a power invested by law in the Industrial Commissioner, can conduct hearings and issue subpoenas for the purpose of investigating and making public the facts of a labor controversy. In only two cases since the establishment of the board has it been found necessary to make such a recommendation. These occurred during the first year of the board's operations. In no case handled by the board during the last year, was it found necessary to take such a step.

Disputes handled by the board usually arise through disagreement regarding the terms of an initial contract between the union and the employer or the renewal of an old contract. Although differing interpretations of an existing contract are occasionally the subject of a mediation conference, such a dispute, as a rule, is more properly the subject of arbitration. Included among the subjects most commonly in dispute in mediation conferences are the type and degree of union recognition, i. e., closed shop, preferential shop, exclusive bargaining agent, representation for union members only, open shop, etc.; the establishment of an orderly grievance machinery with, as a last resort, a provision for arbitration; improvements in conditions of employment, including wages, hours, vacations, holidays, and overtime; provisions for the strengthening of the job security of workers, such as seniority rights, establishment of just cause for discharge, equal distribution of work, employment guarantees, hiring through the union, etc.; and a variety of problems peculiar to the particular industry or firm where the dispute exists.

While the approach to an attempted settlement of such matters generally differs according to the particular nature of

the dispute involved and while the power content of the situation can rarely be disregarded, experience shows that something approaching a line of equity runs through most labor controversies. This line becomes clear when the disputants sit down together for a discussion of their differences and grievances in the light of fact, reason, and common sense. The mediator should attempt to discover this line and use it as a basis of negotiation. When this line is made clear, it is generally found that the disputing parties, who had heretofore firmly believed their interests were entirely at variance, come to realize that they have a reciprocal interest which can then be used by the mediator as a guide to a successful conclusion of the dispute.

The board maintains a record of all agreements which it has been instrumental in effecting, and shortly after the date set in the agreement for the beginning of negotiations for a new contract, approaches both parties and inquires into the progress of negotiations, inviting them to again make use of the services of the board, should they fail to arrive at an agreement by direct negotiations.

The mediation of labor disputes is largely confined to adjusting differences between a labor organization and an employer or a group of employers (trade associations). In recent years however, industrial peace within the State has occasionally been upset by conflicting claims of competing unions; that is, dual unionism and jurisdictional conflicts. The board has acted in such cases when invited to do so by the disputants. During the last year, several matters of this kind were brought to a successful conclusion through the efforts of the board.

The now common practice of including in labor agreements negotiated before the Mediation Board provisions for arbitration of disputes arising under the agreements, and growing recognition of the value of arbitration procedure under col-

lective agreements, is evidenced by the substantial increase in the number of disputes submitted to the Mediation Board for arbitration during the year 1939 (see statistics annexed).

Members of the Mediation Board have avoided acting as arbitrators, because the final and binding character of an award made by an arbitrator may diminish the availability or effectiveness of that person to act subsequently as a mediator between the same parties or in disputes in which those parties are interested. Consequently the board has selected approximately seventy-five outstanding, public spirited citizens, who are willing to act as arbitrator when so invited and designated by the board. This panel of arbitrators has been revised during the last year to maintain an active and well-balanced list of participants upon whom the board can call.

The value of voluntary arbitration in maintaining industrial peace and in intelligently solving disputes which might otherwise lead to breakage of contracts and stoppage of work, has been amply demonstrated by the results of the board's experience in these matters. The fact that the parties may be bound by their contract to submit unsettled disputes to arbitration oftentimes leads the disputants to make a more determined effort to adjust the controversy before resorting to this final step. Many disputes are settled peacefully between the parties after notices have been sent announcing the time and place of the arbitration hearing, but before the actual meeting has been held. Finally, if an arbitration meeting becomes necessary, after hearing a clear and thorough explanation of all sides of the dispute, the parties may agree between themselves and inform the arbitrator that no formal award need be made. The records show that when a formal award is issued, it is extremely seldom that the parties fail to abide voluntarily by its terms. In the event of non-compliance, the decision of the

arbitrator can be enforced through the courts of the State.

Matters most commonly submitted to the board for arbitration during the last year were: the justness of cause for discharge; allowing an employer relief through lay-offs of employees because of adverse business conditions; interpretation of seniority rights; vacation privileges; and establishment of fair piece rates.

In working toward the general objective of promoting permanent industrial peace, the Board of Mediation performs many varied services in conjunction with its mediation and arbitration activities. The board has compiled for the use of employers and unions, sample provisions of contracts for various industries in the State. The board is constantly called upon by employers and unions for a wide variety of information regarding established procedures in industrial relations and various aspects of collective bargaining. Whenever appropriate, the board is glad to give advice to unions and employers on specific problems which they have encountered. The board is especially desirous of encouraging the inclusion in newly negotiated contracts of sound procedures for the handling of grievances with a final provision for the arbitration of differences in the event all other peaceful methods of adjustment fail.

The board is also interested in promoting other aspects of a more mature and effective procedure for collective bargaining negotiations. The reports of the President's commission investigating industrial relations in England and Sweden emphasize the soundness of the establishment of employer's association on an industry-wide basis within certain geographical areas, in order that collective bargaining can function on an industry-wide basis. In certain disputes which have come before the board, the desirability of this practice has been apparent. The board has, in certain appropriate instances, aided

employers and unions in their attempt to establish collective bargaining on an industry-wide basis. The encouragement of this policy has been in line with the objectives of promoting mature relationships between unions and employers and the establishment of practices contributing to industrial peace within the State.

In the event the United States Conciliation Service is asked to intervene in a dispute within the State, notification of its activities is given to the Board of Mediation. Complete co-operation is maintained between the two agencies. In disputes affecting the railroad and maritime industry, however, the National Mediation Board and the Federal Maritime Board have exclusive jurisdiction.

The activities of the Board of Mediation are separate and distinct from those of the National and State Labor Relations Boards. Interpretation and enforcement of the law guaranteeing to labor the right to freely organize and bargain collectively constitute the functions of the Labor Relations Boards. The conciliation, mediation, and arbitration of labor disputes by the State Labor Relations Board is specifically prohibited by the act creating it, and a similar understanding exists in relation to the activities of the National Labor Relations Board. The State Board of Mediation is not a law enforcing body; it was created to facilitate the voluntary and amicable settlement of industrial disputes.

The appended statistical summaries cannot present an accurate picture of the activity of the board. A great many matters which are not such as to lend themselves to adjustment by means of mediation or arbitration are nevertheless brought to a satisfactory conclusion by means of advice and counsel offered to the disputing parties. It is obviously impossible to value the services rendered in this connection, but it is certainly safe to assume that a great many serious situations have been averted by the counsel thus given.

The board does not claim that media-

tion is a solution for all the ills in the field of labor relations. Experience has definitely proved however that the board can do much to avoid open warfare between management and labor, if given the opportunity to mediate before such warfare breaks out, and that it wields considerable influence in maintaining harmonious relationship where such exists, in restoring it where it has broken down, and in creating it where it never before existed. . . .

There follow statistical summaries of the activities of the Board of Mediation for the calendar year, 1939.

MEDIATION

Disputes submitted for mediation before strike	154
Disputes adjusted by mediation before strike	137
Disputes not adjusted	17
Disputes submitted for mediation after strike	156
Disputes adjusted by mediation after strike	143
Disputes not adjusted	13
Total submitted for mediation	310
Total adjusted by mediation	280
Total disputes not adjusted	30
Total employees involved in above disputes	89,012

ARBITRATION

Disputes submitted for arbitration	531
Settled by disputants before award	67
Withdrawn by disputants	27
Settled by arbitrator's award .	437

[The Board's report for 1940 showed 223 disputes mediated in 1938, 310 in 1939, and 370 in 1940; 237 submitted to it for arbitration in 1938, 523 in 1939, and 834 in 1940.]

Matters referred to other agencies:

Total	219
Matters not within jurisdiction of Board or any other government agency ...	285

[These matters included the following:

(a) Employees claiming that they had been improperly fined or otherwise disciplined by the union of which they are members.

(b) Employees claiming that their union had signed a contract with their employer against their express wishes.

(c) Employees claiming that their union does not properly protect their interests.

(d) Employees protesting that they had been denied membership in a union and therefore precluded from securing work in any union shop.

(e) Employees protesting that they have been expelled from a union, with consequent loss of their employment, under a closed shop.

(f) Employers protesting that they had been denied membership in a trade association.

(g) Employers protesting that they were unable to fulfil the terms of a labor agreement executed by them.

(h) Employers protesting that a union had granted a more favorable agreement to a direct competitor.

(i) Employers protesting that unions would not bargain with them through their trade association.

(j) Employers complaining that their direct competitors were not organized and so enjoyed a competitive advantage.

(k) Employers protesting that their business was injured because of jurisdictional and dual unionism disputes.]

Origin of requests for mediation:

By unions	171 — or 55%
By employers	99 — or 32%
Initiated by board	40 — or 13%

Affiliations of unions involved in mediation:

American Federation of Labor	161 — or 52%
Congress of Industrial Organization[s]	130 — or 42%
Independent	19 — or 6%

Affiliations of unions involved in arbitration:

American Federation of Labor	175 — or 33%
Congress of Industrial Organization[s]	345 — or 65%
Independent	11 — or 2%

The American Arbitration Association set up a panel from which industrial disputants may pick arbitrators. The Association reports that almost all awards are obeyed; and that neutral arbitrators are more efficient than tripartite boards.²

² "Three Years of Arbitrating Labor Disputes," *Arbitration Journal*, 5:65-74, January, 1941. See also current data in each issue of this quarterly.—C.R.

PSYCHOLOGY OF CONCILIATION ¹

. . . The most widely employed techniques for the co-operative solution of labor problems are conciliation, arbitration, and predetermination [for instance, a legal minimum wage]. . . [It] is desirable to point out three general principles that are important for them all.

In the first place, while these are essentially co-operative techniques in that there is agreement and co-operation concerning *some* of their behavior, the *interests* of both parties are explicitly acknowledged to be *opposed*, and, *if the result of their co-operative effort does not closely resemble the result that they would expect to achieve through competitive action, co-operation will go by the board and competition will prevail*. Just as most legal decisions are compromises based upon the relative strength of the disputants and elaborately supported by selected precedents and reasoning, purporting to show the consistency and applicability of legal "principles," so also conciliation and arbitration result in compromises that fairly closely represent the believed relative bargaining strength of the parties concerned and the relative importance to them of the point at issue. Where this is not true (as, for instance, where one side believes itself stronger than it really is), conciliation and arbitration break down and there is resort to direct action.

In the second place, the outcome of any conflict is important not only for itself but also because of its effect on the subsequent relative strength of the participants. The obvious illustration of this in the importance attached to legal precedents is only less obvious than its illustration in the "rights" arising out of armed conflicts be-

tween nations. *Every settlement changes the strength of both sides by its terms, and every settlement sets a precedent which will itself strengthen one of the sides for any subsequent dispute.*

Furthermore, it is obviously just as wasteful to fight out every dispute as it is for an individual to go through an intense soul-searching before he performs each action. The saving of energy that is effected for individuals by the development of habits is effected for society by the social habits—folkways, mores, customs, laws—which appear in the sphere of industrial relations just as in any other. The inertia of habitual relationships, the irritation accompanying social changes of any sort (for what *is* soon becomes what is "*right*"), and the memory of the demonstrated real strength of the participants combine to give not only a considerable degree of permanence to decisions reached, but also a superficial appearance of harmony and stability. When a dispute does arise, therefore, the terms of its settlement may have a much more widespread and permanent effect than might be expected from an examination of the specific incidents concerned. . . .

CHANGES OF EMPLOYEE ATTITUDES
RESULTING FROM PARTICIPATION

Where there are regular meetings between representatives of both sides, even when no disputes are under discussion, the knowledge of the opposing side gained by talking together, the habit of friendly discussion, and the mutual attempt to be helpful and co-operative are powerful factors in preventing any disputes from arising. In the United States, standing joint councils, often limited to a single firm, have been particularly successful in certain parts of the clothing industry. The essence of all such standing joint councils is their emphasis on the prevention of disputes by frank and free discussions at fre-

¹ Samuel P. Hayes, Jr., "Psychology of Conciliation and Arbitration Procedures," in *Industrial Conflict: A Psychological Interpretation* (First Yearbook of the Society for the Psychological Study of Social Issues) (New York: The Cordon Company, 1939), pp. 369-370, 383-388, 391-393 Used by permission.—C.R.

quent intervals, rather than on their settlement after they have hardened into definite disputes. The primary psychological problem, which sometimes looms so large, that of even getting the two sides together to discuss their differences, is probably most successfully solved by procedures that make use of such standing joint councils.

Sincere attempts to employ conciliation and arbitration procedures tend to *result in a new feeling on the part of employees that they are "citizens" of industry, that they have rights guaranteed to them, that they "belong" in a system that really affords them some protection.* From this feeling there tends to arise an attitude toward management wholly different from the ordinary attitude of employees. They may recognize the extent to which their interests are harmonious with the interests of their employers, and be stimulated to greater efficiency and productivity. With security of tenure and guaranteed wage rates there may be less work-limitation and a disappearance of minor sabotage and stoppages. The union may even co-operate in reducing wage rates during depression, in introducing new labor-saving machinery or in substituting piece-rates for time-rates, although these changes are usually anathema to union members. Where they know that they can obtain speedy redress for any injury, they may grant management much greater freedom to initiate changes, and where they feel that their own interests as well as those of their employers are at stake, they may work in such a way as to require much less supervision, thus reducing overhead costs. There are, in fact, instances where a union that has been treated honestly has come to the aid of a financially embarrassed employer with generous loans and with suggestions for increasing the efficiency of production and the marketability of his product.

Another result of these co-operative procedures is the training in truly demo-

cratic representative self-government that it affords the participants. Such training builds attitudes and habits that are generally opposed to "radical" solutions of our economic and political problems and that are a firm basis for the achievement of the real democracy for which American liberals have long worked. To the extent that industrial relations are thus bettered, the necessity of state interference in them is reduced. To the extent that workers have satisfactory experience with representative self-government close at home in industry, they become the better prepared and the more disposed to participate in the political affairs of the state as these are now organized.

A third result of the training afforded by participation in conciliation and arbitration is the development of trained and co-operative representatives of both sides. Just as an employer with a background of bitter anti-union activities might be expected to be a relatively unsuccessful conciliator, so also would one expect an employer with years of experience in conciliation to become progressively more successful in achieving by peaceful means necessary changes in productive methods. *To a considerable degree, the instances of failure of conciliation and arbitration to achieve success in America can be laid at the door of the years of open-shop campaign in American industry.* In England, where unionization has been generally accepted for generations, conciliation and arbitration councils are easily recruited from the large numbers of employers who have already had extensive experience with these procedures. In many cases, experts in conciliation who know their industries and the special attitudes, symbols of status, and feelings that comprise the "psychology" peculiar to each trade may be relied upon to do the great majority of the conciliation. For example, all disputes in the Lancashire cotton textile industry are first referred to two such experts, and all but a fraction of one per cent are satis-

factorily disposed of without further committees being involved. In the United States, a similar proportion of the disputes in the stove molding industry are settled by one skilled representative of each side. In recent years, only three disputes failed to be so settled and had consequently to be brought before the full Conference of delegates. In each of these cases, so thoroughly had conciliation trained the participants, the Conference decision was unanimous.

It is important to note that the training which results from co-operative procedures, as just described, itself makes future co-operation more likely to take place, and more probable of success. *Voluntary conciliation and, to a lesser degree, voluntary arbitration tend consequently to perpetuate themselves, in much the same way that competitive procedures tend to self-perpetuation.*

THE IMPORTANCE OF INFORMAL PROCEDURES

Voluntary conciliation and arbitration lay an important stress on informality and on the absence of legalistic emphasis on precedent, hair-splitting argument, and discussion of eternal "rights" and "principles." Lawyers are often explicitly prohibited by the agreements from taking any part in the proceedings!

... technicalities and lawyers should not be admitted before the Board. Such a policy—apart altogether from the saving in cost and time—tends to reduce to a minimum the appearance, and hence, indirectly, the reality of the opposition between the parties.²

The failure of conciliation procedures in the general metal trades, for example, has been explained partly in terms of the discussions by representatives of both sides of general rights and principles, instead of getting down to the practical solution of specific problems, as was done in

the remarkable successful conciliation in the stove molding industry.

The most successful impartial arbitration chairmen in such industries as the men's clothing industry have found that *informality of discussion contributes largely to the success of collective bargaining.* Where both sides are encouraged to present the facts in full and to limit their discussions to the specific issues before them, arguments become pointless and agreements are quickly reached. Even where arbitration awards are necessary, the inclusion of the provision that such awards are not to be considered precedents, especially after a new agreement has been entered into, help to keep alive the informality of hearings and discussions and to avoid the development of a common law for industry, with its consequent long briefs and opinions, and its legalistic atmosphere.

There is a tendency for any informal social relationship gradually to become more formal. The more formal and rigid it becomes, the less flexible is it in the face of the compromises necessitated by changing conditions. For successful industrial relations, informality and adaptability must constantly be revived and emphasized.

VOLUNTARY COMPROMISES VERSUS ARBITRAL AWARDS

In addition to the informality of conciliation procedures, the fact that they result in voluntary compromises is very important in explaining their increasing use in democratic countries at the expense of arbitration procedures, either voluntary or compulsory. *Any authoritative decision tends to be accepted with bad grace and easily results in bitter feelings.* Even a strike may do less harm than an unpopular award with its consequent bad morale, sabotage, and dissension. Arbitrators who do not depend largely on persuasion and out-of-court settlements quickly lose their popularity with both sides. Even where,

² A. C. Pigou, *The Economics of Welfare*, p. 422. (London: Macmillan, 1932).

as frequently happens, they are secretly "directed" by the representatives of both sides to make a mutually acceptable award, they serve as the "goats" upon whom the wrath of the rank and file, and the public wrath even of the leaders, may be wreaked. If this is true of directed (and hence presumably fairly satisfactory) awards, it will readily be understood why independently arbitrated awards are so often unsatisfactory.

Besides the unpopularity of authoritative decisions, there are certain other disadvantages of the arbitration procedures as compared with conciliation. For example, the presence of an arbitrator tends to result in the participants' bringing up all possible issues, important and unimportant, instead of just those issues that would be fought out if no compromise could otherwise be obtained. This is frequently the case where there is a permanent arbitrator, and usually ruins his usefulness after a short period of service. . . .

FACTORS INFLUENCING SUCCESS OF GOVERNMENTAL MACHINERY

One of the factors tending to make governmental machinery successful is the greater prestige accompanying any governmental activity. This perhaps helps to account for the greater success of federal activities as compared with state activities in this country.

Another factor is the publicity often attendant on governmental activities. The parties concerned realize that their actions will be widely known and appraised, and they consequently tend to be less belligerent than they might otherwise be.

A final factor is the presumed disinterestedness of governmental agents. Although many government conciliators are former trade-union officials, and intervention in disputes is sometimes ascribed to political motives, government officials are usually selected in an effort to avoid bias, and *the publicity accompanying their*

action tends to make them live up to what is expected of them.

The reasons that governmental machinery for voluntary conciliation and arbitration has not been more successful are two. In the first place, where both sides really want to conciliate, such machinery is unnecessary, unless it be useful in providing trained and unbiased conciliators and occasionally in persuading the two parties that conciliation is really to their best interests.

In the second place, if either side refuses to co-operate, the machinery is useless, as it has no real powers. Hearings may be held and arbitration awards may even be decided, but hearings are not conclusive if one party refuses to testify and furnish records, and arbitration awards are of little importance unless there is power to enforce them or a strong desire to settle industrial disputes peacefully.

Even where they accept arbitration by neutral parties, both trade unions and employers usually wish to be free to reject any award that is completely unsatisfactory and tend to oppose any system where compulsion enters in. When English courts held that certain decisions of the Industrial Court were enforceable, some of the trade unions became opposed to any reference of disputes to the Court, and consequently its usefulness was decreased. The Act of 1894 in South Australia provided for compulsory arbitration of industrial disputes wherever registered trade unions were concerned, thus making it possible for the unions, by registering, to choose arbitration with enforceable awards. But none of the unions chose to register, as there was "no real desire in South Australia to use or submit to compulsory arbitration." New South Wales passed a voluntary conciliation and arbitration law in 1892 that failed for similar reasons. It provided no power to compel attendance of witnesses or production of books, accounts, and papers, and the employers "treated it with contempt."

The Railway Labor Board, established in the United States by the Transportation Act of 1920, ceased to function effectively when unions and employers found that they could ignore its orders with impunity. The public opinion which it had been expected would be sufficient to cause compliance was not easily formed on such questions as the Labor Board had to decide, and even when it was formed, it was not effective in commanding observance.

The provision by governmental authorities of facilities for voluntary conciliation, mediation, and arbitration is undoubtedly of some value to the cause of

industrial peace in the sense that trained and neutral conciliators are made available and the pressure of public authorities and of public opinion may be brought to bear; but its value seems greater for emergencies of considerable social importance³ than for the recurrent disputes that characterize many organized industries. For the latter, if there is a real desire for industrial peace, machinery developed within the trade seems to offer more prospects of permanent usefulness.

³ And for smaller disputes in industries not yet accustomed to collective bargaining.—C.R.

NATIONAL LABOR RELATIONS BOARD *v.* COLUMBIAN ENAMELING & STAMPING COMPANY

Supreme Court of the United States. 1939.
306 U. S. 292; 59 Sup. Ct. 501; 83 L. Ed. 480.

Enameling and Stamping Mill Employees Union No. 19694 at Terre Haute, Indiana, in 1934 signed a one-year agreement with the company, terminable on thirty days' notice. The contract provided for an arbitration committee and that there should be no stoppage pending that committee's decision (that is, unless the thirty days' notice of abrogation were given). Later demands were discussed by the company but rejected. On March 23, 1935, a strike was called and 450 of the 500 employees left work. The union later drew the other Terre Haute unions into a brief general strike and Terre Haute was then kept under martial law for a long time by Governor P. V. McNutt.

The union complained to the Board that during the strike, on July 23, 1935, the company refused to bargain with it; that this unfair labor practice was to blame for the continuance of the strike and the strikers' displacement by other workers; and that, therefore, under the National Labor Relations Act, the strikers ought to be reinstated in their old jobs.

* * * *

MR. JUSTICE STONE delivered the opinion of the Court. . . .

The strike was in effect July 5, 1935,

when the National Labor Relations Act was approved, and continued until about July 23rd, when respondent resumed operations at its plant. By August 19th it had received three thousand applications for employment and had re-employed one hundred and ninety of its production employees. By the end of the second week in September respondent had employed a full force. On July 23rd two labor conciliators from the Department of Labor appeared in Terre Haute and were requested by the Union "to try and open up negotiations with the respondent." On that day the conciliators met and conferred with respondent's president, who agreed to meet them with the Scale Committee. Several days later he informed them that he would not meet with them or with the Scale Committee. Later respondent received, but did not answer, letters of the Union of September 20th and October 11th, asking for a meeting to settle the controversy between them.

The Board concluded that on July 23rd the "union represented a majority of the respondent's employees, that it sought to

bargain with the respondent, that the respondent refused to so bargain, and that this constituted an unfair labor practice" within the meaning of §8, subdivision (5) of the Act. It ordered respondent to discharge all of its production employees who were not employed by it on July 22, 1935, to reinstate its employees as of that date, and thereupon to desist from refusing to bargain with the Union as the exclusive representative of respondent's production employees. . . .

. . . The date fixed by the Board was July 23rd, when respondent reopened its factory, and the occasion was the personal interview on that day and a later telephone conversation of respondent's president with the conciliators from the Labor Department, who were not members or official representatives of the Union and who, so far as the testimony discloses, did not then appear to the president to be authorized to speak for the Union.

In appraising these transactions between the conciliators and respondent's president, it is important to bear in mind the nature and extent of the legal duty imposed upon the employer by the National Labor Relations Act. Section 8 (5) declares that it is an "unfair labor practice" for an employer "To refuse to bargain collectively with the representatives of his employees," and §2 and 10(c) give to the Board an extensive authority to order the employer to cease an unfair labor practice and to compel reinstatement of employees with back pay when employment has ceased in consequence of a labor dispute or unfair labor practice. See *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 [reported in Chapter 5]. While the Act thus makes it the employer's duty to bargain with his employees, and failure to perform that duty entails serious consequences to him, it imposes no like duty on his employees. Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no

breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.

However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining, and that he may ignore or reject proposals for such bargaining which come from third persons not purporting to act with authority of his employees, without violation of law and without suffering the drastic consequences which violation may entail. To put the employer in default here the employees must at least have signified to respondent their desire to negotiate. Measured by this test the Board's conclusion that respondent refused to bargain with the Union is without support, for the reason that there is no evidence that the Union gave to the employer, through the conciliators or otherwise, any indication of its willingness to bargain or that respondent knew that they represented the Union. The employer cannot, under the statute, be charged with refusal of that which is not proffered.

During the eight months preceding the strike respondent had, upon request, entered into negotiations with the Union on some eleven different occasions. Such meetings, always with some known representatives of the Union, were customarily with the Union Scale Committee and on its written request. All negotiations were broken off by the Union by the strike which followed almost immediately

its resolutions of March 17th. On July 23rd the strike had continued for about four months, accompanied by picketing, violence and destruction of property, and had culminated, on July 22nd, in a proclamation of martial law. A meeting on June 11th had resulted in no change of attitude on either side. From then until July 23rd no attempt appears to have been made on either side to resume negotiations.

While there was before the Board testimony of the secretary of the Union that on July 23rd he had asked the conciliators to "try and open up negotiations," there was no testimony that respondent or its officers had ever been informed of that fact or that they were advised in any way of the willingness of the Union to enter into negotiations. This was pointedly brought to the attention of the Board and the trial examiner by a motion to strike the testimony of the secretary and that of respondent's president, giving his account of his interview with the conciliators. But the conciliators were not called as witnesses and no attempt was made to supply the omission.

Respondent's president testified that on July 23rd the conciliators asked him if he would meet with them and the Scale Committee; that he replied that he would; that no meeting was arranged and that several days later he called one of the conciliators on the telephone and informed him that he, the witness, "would not have any meeting with him or with the Scale Committee." All else that took place between the conciliators and respondent is left a matter of conjecture.

This testimony, on which the Board relies to support its finding, shows on its face that there was no indication until sometime later than July 23rd of any unwillingness on the part of respondent's president to meet the Union. Furthermore, it contains no hint that the Union at any time after July 5th and before September communicated to respondent its willing-

ness to bargain, or that the conciliators, in asking a meeting and discussing the matter with respondent's president, purported to speak for the Union. The testimony is consistent throughout with the inference, and indeed supports it, that the conciliators, so far as known to respondent, appeared in their official role as mediators to compose the long-standing dispute between respondent and its employees; that the employer first consented in advance to attend a meeting, and later withdrew its consent when they had failed for some days to arrange a meeting. Whether in the meantime the Scale Committee or any other representative of the union was in fact willing to attend a meeting does not appear. . . .

[The circuit court's refusal to order the strikers reinstated is]

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting. . . .

To conclude that the company—through its president—was unaware the conciliators were acting at the instance of the Union, and, therefore, is not to be held responsible for its flat refusal to meet with its employees, is both to ignore the record and to shut our eyes to the realities of the conditions of modern industry and industrial strife. The atmosphere of a strike between an employer and employees with whom the employer is familiar does not evoke, and should not require, punctilious observance of legalistic formalities and social exactness in discussions relative to the settlement of the strike. It is difficult to imagine that—during several hours of conversation between the conciliators and the company's president concerning a future meeting of Union and company—the conciliators refrained from reference to the Union's request that the conciliators arrange such a future meeting. In a realistic view, the company's

statement of July 23 to the conciliators, that it would meet with them and the Union, clearly indicated the company's acceptance of the fact that the conciliators were appearing for the Union. The company's declaration to the conciliators, several days later, that it would not meet with the Union or the conciliators, equally represents the company's recognition and acceptance of the fact that the conciliators were a means of dealing with the Union.

Not only did the Labor Board find the evidence sufficient to show that the company refused to bargain with the Union on or about July 23, but the court below reached the same conclusion. The rule is well settled that findings of fact concurred in by two lower courts will not "be disturbed unless plainly without support." This rule equally applies when an administrative body and a lower court—as here—concur on findings of fact, and the rule is even more persuasive where, as in the Act creating the Labor Board, it is provided that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." The majority opinion, of the Court of Appeals in this case said:

"This conclusion [refusal to enforce the Board's action] does not mean that we approve or uphold the refusal of the respondent to meet the request of the conciliators and enter into negotiations looking toward the settlement of disputes after the employees had quit their employment. Respondent's employees were largely unionized. Under the Act, respondent, when requested to negotiate, was in duty bound to do so. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 [reported in Chapter 5]. Instead it lent a friendly ear to unwise counsel wholly out of sympathy with the legislation designed to avoid and settle capital-labor disputes. It erred in its refusal to respect the law and . . . [ignored] the request of those charged with the burdensome task of working out a peaceful solution of what had become a bitter controversy. There is little or no explanation which we can find for their refusal, save an open, defiant flouting of the law of the land."

Respondent's striking employees remained employees—while on strike—

within the meaning of the National Labor Relations Act (Sec. 2[3]) because their work had ceased "as the consequence of . . . [and] in connection with . . . [a] current labor dispute. . . ." The statutory rights of these striking employees could not be destroyed, and respondent could not commit unfair labor practices and then escape liability by reopening the plant with a full complement of non-Union men.

Second. The court below was of opinion that the strike of March 22, 1935, violated the particular provision of the July 14, 1934, contract with the company that "There shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration." Solely because it believed the Union had violated its contract, the court below declined to enforce the Board's order, and held that the company could not be made responsible for its own violation of the Act.

In this, I believe the court below was in error. A disagreement over the terms of a contract governing employer-employee relations is a labor dispute within the terms of the Act. Such a disagreement can—as it did here—produce industrial strife which the Act was expressly designed to prevent. Had Congress provided that violation of a private contract would deprive employees and the public of the benefits of the law, a different question would be presented. But Congress did not so provide and, in addition, the Union did not violate its contract. It contracted not to strike "pending decision by the Committee of Arbitration" but there was no decision "pending." There was no arbitration pending because the company would not arbitrate. If the contract was broken, it was the company—not the Union—that broke it.

I believe the judgment of the court below should be reversed and that the Board's order should be enforced.

MR. JUSTICE REED joins in this dissent.

* *

The reader will recall that anti-injunction laws considered at the end of Chapter I tried to make negotiation, mediation, or arbitra-

tion a prerequisite for an injunction. The duty to bargain created by the National Labor Relations Act is considered further in the next chapter.

II. CONCILIATION AND ANTI-DISCRIMINATION RULES IN THE RAILROAD INDUSTRY

The 1880's saw many railroad strikes. This situation led to the introduction of many bills and resolutions in Congress. At the same time there was agitation for federal regulation of railroad rates, and the Interstate Commerce Commission was set up in 1887. In 1888, as a result of serious strikes, Congress passed a law governing labor disputes; the law covered only the transportation-division employees of the railroads. It provided for voluntary arbitration, and also for strike-investigation boards to be appointed by the President. The law was unused, except for the appointment of a board to investigate the Pullman Strike of 1894 (see *In re Debs*, in an earlier chapter).

Since the law was unused, substitutes were proposed, and in 1898 the Erdman Act was passed. It provided for mediation by the chairman of the I. C. C. and the federal Commissioner of Labor. If the parties agreed to

arbitrate, the arbitration awards were to be enforceable by court order and there was to be no suspension of work for three months after the award was made. Investigation (other than that by mediators and arbitrators) was not mentioned. But Congress followed the lead of several state legislatures in making it illegal for a railroad to discriminate against men for union membership.¹

For about eight years, the law was not used. But the anti-discrimination section was put to the test by the indictment of one Adair, whose case was fought up to the Supreme Court.

¹ Limitations on employers' freedom to discharge for union activity (discrimination) are considered at length in the next chapter, where they again are seen as efforts to promote industrial peace, but where they are unrelated to a systematic conciliation system such as is discussed here.—C.R.

ADAIR *v.* UNITED STATES

Supreme Court of the United States. 1908.
208 U. S. 161; 28 Sup. Ct. 277; 52 L. Ed. 436.

MR. JUSTICE HARLAN delivered the opinion of the Court. . . .

May Congress make it a criminal offense against the United States—as by the tenth section of the act of 1898 it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employé from its service simply because of his membership in a labor organization? . . .

The first inquiry is whether the part of the tenth section of the act of 1898 upon which the first count of the indictment was based is repugnant to the Fifth Amendment of the Constitution declaring that no person shall be deprived of liberty or property without due process of

law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good. . . .

. . . It was the legal right of the de-

fendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. . . . Of course, if the parties by contract fix the period of service, and prescribe the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action. And it may be—but upon that point we express no opinion—that in the case of a labor contract between an employer engaged in interstate commerce and his employé, Congress could make it a crime for either party without sufficient or just excuse or notice to disregard the terms of such contract or to refuse to perform it. In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be . . . that an employer is under any legal obligation, against his will, to retain an employé in his personal service any more than an employé can be compelled, against his will, to remain in the personal service of another. . . .

But it is suggested that the authority to make it a crime for an agent or officer of an interstate carrier, having authority in the premises from his principal, to discharge an employé . . . simply because of his membership in a labor organization, can be referred to the power of Congress to regulate interstate commerce,

without regard to any question of personal liberty or right of property arising under the Fifth Amendment. . . .

. . . But what possible legal or logical connection is there between an employé's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employé is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its [*sic*] members as wage-earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. . . . Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the States? . . .

. . . we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employé because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its [*sic*] interstate business *only*

members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States. . . .

It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment and as not embraced by nor within the power of Congress to regulate interstate commerce, but under the guise of regulating interstate commerce and as applied to this case it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair. . . .

The judgment must be reversed. . . .

MR. JUSTICE MOODY did not participate in the decision of this case.

MR. JUSTICE McKENNA, dissenting. . . .

. . . The provisions of the act are explicit and present a well co-ordinated plan for the settlement of disputes between carriers and their employes, by bringing the disputes to arbitration and accommodation, and thereby prevent strikes and the public disorder and derangement of business that may be consequent upon them. I submit no worthier purpose can engage legislative attention or be the object of legislative action, and, it might be urged, to attain which the congressional judgment of means should not be brought under a rigid limitation and condemned.

. . .

We are told that labor associations are to be commended. May not then Congress recognize their existence; yes, and recognize their power as conditions to be counted with in framing its legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the fellowship which binds them—maybe controls and impels them—

whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom Congress observed—observed, I may say, not in speculation of uncertain provision of evils, but in experience of evils—an experience which approached to the dimensions of a national calamity. The facts of history should not be overlooked, nor the course of legislation. The act involved in the present case was preceded by one enacted in 1888 of similar purport. 25 Stat. 501, c. 1063. That act did not recognize labor associations, or distinguish between the members of such associations and the other employes of carriers. It failed in its purpose, whether from defect in its provisions or other cause we may only conjecture. At any rate, it did not avert the strike at Chicago in 1894. Investigation followed, and, as a result of it, the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1888 failed to reach or avert. It was the judgment of Congress that the scheme of arbitration might be helped by engaging in it the labor associations. Those associations unified bodies of employes in every department of the carriers, and this unity could be an obstacle or an aid to arbitration. It was attempted to be made an aid, but how could it be made an aid if, pending the efforts of “mediation and conciliation” of the dispute, as provided in §2 of the act, other provisions of the act may be arbitrarily disregarded, which are of concern to the members in the dispute? How can it be an aid, how can controversies which may seriously interrupt or threaten to interrupt the business of carriers . . . be averted or composed if the carrier can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim or caprice, for this is the liberty which is attempted to be vindicated as the Constitutional right of the carriers. And it may be exercised in mere whim and caprice. If ability, the qualities of efficient and

faithful workmanship can be found outside of labor associations, surely they may be found inside of them. Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition. . . .

. . . It also seems to me to be an oversight of the proportions of things to contend that in order to encourage a policy of arbitration between carriers and their employes which may prevent a disastrous interruption of commerce, the derangement of business, and even greater evils to the public welfare, Congress cannot restrain the discharge of an employé, and yet can, to enforce a policy of unrestrained competition between railroads, prohibit reasonable agreements between them as to the rates at which merchandise shall be carried. . . .

I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a *quasi*-public business and therefore subject to control in the interest of the public.

I think the judgment should be affirmed.

MR. JUSTICE HOLMES, dissenting.

As we all know, there are special labor unions of men engaged in the service of carriers. These unions exercise a direct influence upon the employment of labor in that business, upon the terms of such employment, and upon the business itself. Their very existence is directed specifically to the business, and their connection with it is at least as intimate and important as that of safety couplers, and, I should think, as the liability of master to servant, matters which, it is admitted, Congress might regulate, so far as they concern commerce among the States. I suppose that it would hardly be denied that some of the relations of railroads with unions of railroad employes are closely

enough connected with commerce to justify legislation by Congress. If so, legislation to prevent the exclusion of such unions from employment is sufficiently near.

The ground on which this particular law is held bad is not so much that it deals with matters remote from commerce among the States, as that it interferes with the paramount individual rights, secured by the Fifth Amendment. The section is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ any one. It does not forbid them to refuse to employ any one, for any reason they deem good, even where the notion of a choice of persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract lawfully may be made to end are less open to regulation than other terms. So I turn to the general question whether the employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the word liberty in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Whether there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend

to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much labor unions do, is one on which intelligent people may differ—I think that laboring men sometimes attribute to them advantages, as many at-

tribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.

RAILROAD LABOR IN 1910-30

Since relatively little use was made of the Erdman Act, further proposals were brought forward and in 1913 the Newlands Act amended the Erdman Act. The immediate occasion was the dissatisfaction of railroad unions with the results of arbitration, which they thought might be improved if everything did not depend on one man. The new law therefore authorized official arbitrations with two neutrals instead of one, if the parties chose. It also set up a permanent mediation board. If an agreement was reached after mediation, and if the parties then disagreed as to its meaning, the board was to give an interpretation of the disputed passage. The interpretation did not bind the parties, but this clause recognized the need for some sort of regular machinery for adjusting grievances.

The new law was not completely effective, as can be seen from the course of the 1916 dispute over the eight-hour day. The transportation-division employees, who were the best organized among the railroad workers and who alone were covered by the conciliation laws, refused to arbitrate their demand that the basic ten-hour day become a basic eight-hour day, at the same daily rates of pay. The business boom and rising costs of living gave them assurance. Their threat to strike forced Congress to vote the Adamson Act.

At the close of 1917 the war production and transportation problem led the administration to take over the railroads. It issued wage orders applying to the whole industry. To deal with the disputes which arose out of the orders, a board of railroad wages and working conditions was set up.

Section 5 of General Order 8 of the Railroad Administration decreed that employees

were not to be discriminated against for union activity. Partly because of this order and partly because of the business boom, railroad unions grew very rapidly, just as unions did in other industries, helped, too, by the anti-discrimination rules of the National War Labor Board (below). The Railroad Administration entered into national agreements with most of the unions, an arrangement for which even the strong transportation-division unions had asked the railroads in vain. Now the arrangement was applied generally on the railroads and collective bargaining introduced into parts of the industry that had not known it.

Three national adjustment boards (covering three groups of employees) were appointed to settle disputes arising out of the interpretation of the agreements and the rules of the Railroad Administration. The boards were made up half of employer representatives and half of union representatives. They took cases only after negotiation had failed. Though bipartisan boards often deadlock, the pressure of the war situation helped these boards to agree in almost every case; neutrals were rarely called in. The Railroad Administration recommended that the boards be continued after federal control ended.

We have seen that the ending of the war freed workers from various restraints on striking, and on the railroads, too, 1919 saw some strikes. Bills were being introduced into Congress to return the railroads to private management and to provide mechanisms for promoting labor peace. Compulsory arbitration was often mentioned. The Supreme Court, in upholding the Adamson Act in 1917, had said that Congress had power to establish compulsory arbitration (though the dissent chided the majority for going out of

its way to make such an assertion).¹ In January, 1920, the Kansas legislature enacted compulsory arbitration for "essential industries." But when the Transportation Act of 1920 (the Esch-Cummings Act) was finally passed, it did not include compulsory arbitration. It included all railroad employees, not only the transportation employees. It said that disputes should be settled by negotiation if possible. If not, they were to go to a local or regional board of adjustment, which would have been established by agreement. Appeal was to a new board of nine members, three from employers, three from unions, and three public members—the Railroad Labor Board. Larger disputes were also in the Board's province—for instance, wage-level disputes; but, if the Board found, after awarding a wage increase, that the award was leading toward a rate increase, it could suspend its award. A decision of the Board was not to be valid unless five members concurred; in wage decisions, at least one of the concurring members had to be a representative of the public. The Board's decisions were not enforceable.

The unions urged President Wilson to veto the bill, but he did not. The railroads would not co-operate with the unions in setting up adjustment boards, especially because the unions wanted nation-wide boards. As a result, the Railroad Labor Board was flooded with cases which should have gone to adjustment boards; every decision was delayed. The depression lost the unions many members. The shopmen lost a nation-wide strike in 1922 and were able to blame the result partly on the Board, whose policy actually helped the railroads to set up a great many company unions.

After several efforts, the unions got the railroad managers to agree with them that a new railroad labor law was needed. They drew one up and Congress passed it in 1926

as the Railway Labor Act. A Board of Mediation was set up. If its mediation did not succeed in settling a dispute, it was to urge the parties to arbitrate under the act. Arbitration was voluntary, but awards were to be binding, once they were made. If the parties did not agree to arbitrate, they were not to cause a suspension of work during a thirty-day notice period, or for ten days after their last conference, if the Board took no action. If the Board saw that the dispute threatened to interrupt commerce, it was to ask the President to set up an emergency board of investigation, and suspensions were illegal during the investigation and for thirty days after the investigating board had made its recommendation. The mediation provisions were similar to sections 4-6 of the act as amended in 1934 (quoted below); the arbitration and investigation provisions were exactly the same as sections 7-10 (quoted below). The 1926 law contemplated that the parties would create adjustment boards and would agree to be bound by the decisions of these boards in grievance cases. A glance at section 3 of the amended act will show that this suggestion was not taken up actively between 1926 and 1934.

The anti-discrimination idea was embodied in the 1926 act only vaguely. The 1926 law declared that it was the duty of the parties to exert every reasonable effort to make agreements and to settle all disputes in conference. To this end, the parties were to designate representatives without interference from the other side. These words banned discrimination only a little more clearly than the 1920 act had; and that act had proved to be a rope of sand when a union tried to use it to get damages from a railroad. *Pennsylvania Federation No. 90 v. Pennsylvania R.R. Co.*, discussed two pages below. Yet, though the 1926 law was still vague, the Railway Clerks union undertook legal action against the Texas and New Orleans Railroad, which was refusing to recognize the union.

¹ *Wilson v. New*, 243 U. S. 332 (1917), reported in Chapter 7.

TEXAS & NEW ORLEANS RAILROAD *v.* BROTHERHOOD OF RAILROAD CLERKS

Supreme Court of the United States. 1930.
281 U. S. 548; 50 Sup. Ct. 427; 70 L. Ed. 1034.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This suit was brought in the District Court by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Southern Pacific Lines in Texas and Louisiana, a voluntary association . . . against the Texas and New Orleans Railroad Company . . . to obtain an injunction restraining the defendants from interfering with, influencing or coercing the clerical employees of the Railroad Company in the matter of their organization and designation of representatives for the purposes set forth in the Railway Labor Act of May 20, 1926. . . .

The substance of the allegations of the bill of complaint was that the Brotherhood, since its organization in September, 1918, had been authorized by a majority of the railway clerks in the employ of the Railroad Company (apart from general office employees) to represent them in all matters relating to their employment; that this representation was recognized by the Railroad Company before and after the application by the Brotherhood in November, 1925, for an increase of the wages of the railway clerks and after the denial of that application by the Railroad Company and the reference of the controversy by the Brotherhood to the United States Board of Mediation [for railroads]; that, while the controversy was pending before the Board, the Railroad Company instigated the formation of a union of its railway clerks (other than general office employees) known as the "Association of Clerical Employees—Southern Pacific Lines"; and that the Railroad Company had endeavored to intimidate members of the Brotherhood and to coerce them to

withdraw from it and to make the Association their representative in dealings with the Railroad Company, and thus to prevent the railway clerks from freely designating their representatives by collective action.

The District Court granted a temporary injunction. Thereafter the Railroad Company recognized the Association of Clerical Employees—Southern Pacific Lines as the representative of the clerical employees of the Company. The Railroad Company stated that this course was taken after a committee of the Association had shown authorizations signed by those who were regarded as constituting a majority of the employees of the described class. The subsequent action of the Railroad Company and its officers and agents was in accord with this recognition of the Association and the consequent non-recognition of the Brotherhood. In proceedings to punish for contempt, the District Court decided that the Railroad Company and certain of its officers who were defendants had violated the order of injunction and completely nullified it. The Court directed that, in order to purge themselves of this contempt, the Railroad Company and these officers should completely "disestablish the Association of Clerical Employees," as it was then constituted as the recognized representative of the clerical employees of the Railroad Company, and should reinstate the Brotherhood as such representative, until such time as these employees by secret ballot taken in accordance with the further direction of the Court, and without the dictation or interference of the Railroad Company and its officers, should choose other representatives. The order also required the restoration to service and to stated privileges of

certain employees who had been discharged by the Railroad Company. 24 F. (2d) 426. Punishment was prescribed in case the defendants did not purge themselves of contempt as directed. . . .

. . . the Railway Labor Act . . . provides as follows:

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

The controversy is with respect to the construction, validity and application of this statutory provision. The petitioners, the Railroad Company and its officers, contend that the provision confers merely an abstract right which was not intended to be enforced by legal proceedings; that, in so far as the statute undertakes to prevent either party from influencing the other in the selection of representatives, it is unconstitutional because it seeks to take away an inherent and inalienable right in violation of the First and Fifth Amendments of the Federal Constitution; that the granting of the injunction was prohibited by Section 20 of the Clayton Act. . . .

[A letter from the road's vice-president to the president estimated that if the union's demand for a raise went to arbitration and the award were like that on the lines west of El Paso, the payroll would rise \$340,000 a year. He added:]

. . . it is our intention, when handling the matter in mediation proceedings, to raise the question of the right of this organization to represent these employees and if arbitration is proposed we shall decline to arbitrate on the basis that the petitioner does not represent the majority of the employees. This will permit us to get away from the interference of this organization, and if successful in this, I am satisfied we can make settlement with our own

employees at a cost not to exceed \$75,000 per annum. . . .

It is unnecessary to review the history of the legislation enacted by Congress in relation to the settlement of railway labor disputes, as earlier efforts culminated in Title III of the Transportation Act, 1920 . . . the purpose and effect of which have been determined by this Court. In *Pennsylvania Railroad Company v. United States Railroad Labor Board*, 261 U. S. 72, the question was whether the members of the Railroad Labor Board as constituted under the provisions of the Transportation Act, 1920, had exceeded their powers. The Court held that the Board had jurisdiction to hear and decide a dispute over rules and working conditions upon the application of either side, when the parties had failed to agree and an adjustment board had not been organized. The Board also had jurisdiction to decide who might represent the employees in the conferences contemplated by the statute and to make reasonable rules for ascertaining the will of the employees in this respect. Interference by injunction with the exercise of the discretion of the Board in matters committed to it, and with the publication of its opinions, was decided to be unwarranted. The Court thought it evident that Congress considered it to be "of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes," and that its plan was "to encourage settlement without strikes, first by conference between the parties: failing that, by reference to adjustment boards of the parties' own choosing," and, if this proved to be ineffective, "by a full hearing before a National Board" organized as the statute provided. But the Court added: "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decisions is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publica-

tion of the violation of such decision by any party to the proceeding." It was said to be the evident thought of Congress "that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault." *Id.* pp. 79, 80. The Court concluded that the Labor Board was "to act as a Board of Arbitration," but that there was "no constraint" upon the parties "to do what the Board decides they should do except the moral constraint of publication of its decisions." *Id.* p. 84.

The provisions of Title III of the Transportation Act, 1920, were again before the Court in *Pennsylvania Railroad System and Allied Lines Federation No. 90 v. Pennsylvania Railroad Company*, 267 U. S. 203. This was a suit by a union to enjoin the Railroad Company from carrying out an alleged conspiracy to defeat the provisions of the legislation establishing the Railroad Labor Board. The complainants, the Court said, sought "to enforce by mandatory injunction a compliance with a decision of the Board"; and the Court held that "such a remedy by injunction in a court, it was not the intention of Congress to provide." *Id.* p. 216. The Court pointed out that "the ultimate decision of the Board, it is conceded, is not compulsory, and no process is furnished to enforce it." It was in the light of these conclusions as to the purport of the statute that the Court considered the freedom of action of the Railroad Company. The Court said that the Company was using "every endeavor to avoid compliance with the judgment and principles of the Labor Board as to the proper method of securing representatives of the whole body of its employees," that it was "seeking to control its employees by agreements free from

the influence of an independent trade union," and, so far as concerned its dealing with its employees, was "refusing to comply with the decisions of the Labor Board." But the Court held that this conduct was within the strict legal rights of the Railroad Company and that Congress had not intended to make such conduct legally actionable. *Id.* p. 217.

It was with clear appreciation of the infirmity of the existing legislation, and in the endeavor to establish a more practicable plan in order to accomplish the desired result, that Congress enacted the Railway Labor Act of 1926. It was decided to make a fresh start. The situation was thus described in the report of the bill to the Senate by the Committee on Interstate Commerce (69th Cong., 1st sess., 1 Sen. Rep. No. 222): "In view of the fact that the employees absolutely refuse to appear before the labor board and that many of the important railroads are themselves opposed to it, that it has been held by the Supreme Court to have no power to enforce its judgments, that its authority is not recognized or respected by the employees and a number of important railroads, that the President has suggested that it would be wise to seek a substitute for it, and that the party platforms of both the Republican and Democratic Parties in 1924 clearly indicated dissatisfaction with the provisions of the transportation act relating to labor, the committee concluded that the time had arrived when the labor board should be abolished and the provisions relating to labor in the transportation act, 1920, should be repealed."

The bill was introduced as the result of prolonged conferences between representative committees of railroad presidents and of executives of railroad labor organizations, and embodied an agreement of a large majority of both. The provisions of Title III of the Transportation Act, 1920, and also the Act of July 15, 1913 (c. 6, 38 Stat. 103) which provided for mediation, conciliation and arbitration in contro-

versies with railway employees, were repealed. . . .

[The Court here notes the compulsory elements in the law: if arbitration is agreed to by the parties, the award is to be enforceable at law; if the president appoints an emergency board of investigation, no strike may be called for 60 days. Congress prescribed no definite penalties, but indicated that the courts should enforce the duties created.]

It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision third of Section 2 of the Act providing that "Representatives for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. This addition cannot be treated as superfluous or insignificant, or as intended to be without effect. . . . While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. The intent of Congress is clear

with respect to the sort of conduct that is prohibited. "Interference" with freedom of action and "coercion" refer to well understood concepts of the law. . . . "Influence" in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization." The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known applications of the law with respect to fraud, duress and undue influence. If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose, as the present suit demonstrates.

In reaching a conclusion as to the intent of Congress, the importance of the prohibition in its relation to the plan devised by the Act must have appropriate consideration. Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress

inserted in the Act cannot therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated.

The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. . . .

. . . The petitioners invoke the principle declared in *Adair v. United States*, 208 U. S. 161 [reported above], and *Coppage*

v. Kansas, 236 U. S. 1, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds. . . .

Decree affirmed.

THE RAILWAY LABOR ACT AS AMENDED IN 1934

44 Stat. 577 and 48 Stat. 1185; 45 U. S. C. §§ 151-64.

The depression prevented the Court's *Texas* decision from bringing about a widespread replacement of railroad company unions by independent unions. A fresh attack on discrimination was made after the depression election of 1932. Congress in March, 1933, incorporated into the Bankruptcy Act of 1933 a requirement that receivers of bankrupt concerns (railroads and others) do not interfere with employees' self-organization. In June a similar clause was put into the N. R. A. law, which did not apply to railroads, and the Emergency Transportation Act of 1933 forbade discrimination and company-dominated unions in the railroad industry.

The railroad unions wanted more definite rights and, despite management opposition, got them from Congress in 1934 in an amendment to the Railroad Labor Act. The revised law not only compelled the creation of national adjustment boards but gave a revamped mediation board power to hold collective-bargaining elections—elections which were to be the death sentence of most company unions. It retained the 1920-1926 obligation to bargain collectively; this clause was still without any enforcement provision, but was more definite, for the parties had to agree on a time and place for a meeting. Interference with self-organization rated criminal penalties; as we shall see, in this

respect the railroad law is stricter than the National Labor Relations Act, passed a year later. The law was held constitutional in *Virginian Railway v. System Federation No. 40*, 300 U. S. 515, 57 Sup. Ct. 592 (1937).

* * * *

An Act . . . to provide for the prompt disposition of disputes between carriers and their employees.

SEC. 1. [Definitions.]

GENERAL PURPOSES

SEC. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out

of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents,

shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the

receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its

services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom

any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS

SEC. 3. [a-h. A "National Railroad Adjustment Board" is set up, with four divisions with the following jurisdictions: (1) train- and yard-service employees, that is, engineers, firemen, conductors, trainmen, etc. (10 members); (2) machinists, boilermakers, and other shop employees (10 members); (3) telegraphers, train dispatchers, maintenance-of-way men, clerical employees, sleeping-car conductors and porters, etc. (10 members); (4) water-transportation employees of railroad companies and employees not otherwise covered (6 members). Half of each group represent railroads and half national labor unions organized in accordance with section 2. Members are paid by the party they represent.]

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of

approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however*, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee," to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the

same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

[m-w. Adjustment-board divisions may make orders including awards of money. If a railroad does not obey an order, a federal district court may enforce it. The court is to accept the division's finding of facts as *prima-facie* evidence. The employee need pay no court costs in the district court, but has to pay costs if he appeals to a circuit court. If he wins his case, the railroad must pay him a reasonable attorney's fee. He must begin his case within two years of the division's order.

[Any division may set up regional adjustment boards.

[Second. Single roads and unions of their employees may agree to set up adjustment boards of their own; either side may return to the main adjustment-board system by giving ninety days' notice.]

NATIONAL MEDIATION BOARD

SEC. 4. [The "National Mediation Board" is created (to succeed the Board of Mediation created by the 1926 act). It has three members who are paid \$10,000 and expenses.]

SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication

with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provision of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only

those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

ARBITRATION ¹

SEC. 7. [An unsettled controversy may be submitted to arbitration if the parties choose. Each side picks one (or two) men; these pick one (or two) neutrals. If they cannot agree on a neutral or neutrals, the Mediation Board chooses them. Neutrals are paid by the Mediation Board. Awards are filed with the nearest federal district court. The arbitration board takes testi-

mony under oath and may subpoena witnesses.

SEC. 8. [The agreement to arbitrate is (among other things) to provide that any disagreement as to the meaning of the award is to be referred back to the arbitration board, whose decision on the point is to be filed in the court along with the award. If the two disputing parties both wish to do so, they may call the arbitration off.

SEC. 9. [Unless one party files with the court a petition to impeach the award, within ten days of its filing, it becomes an order of the court. Impeachment may be only on the ground that the arbitration did not conform to the act, that the award is not confined to the field laid down by the agreement to arbitrate, or that fraud or corruption influenced the decision. Trivial complaints are to be disregarded. If the award is too vague, it is to go back to the arbitration board. If the court holds part of the award invalid, the whole is to be considered invalid, unless the parties agree to keep the rest of the award. Appeal in these cases may be taken to the circuit court, but no further. Nothing in the law is to be construed to require an individual employee to work without his consent or to make it illegal for him to quit his work. No court may order an employee to work without his consent.]

EMERGENCY BOARD

SEC. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem de-

¹ Secs. 7-14 of the 1926 law were not changed by 1934 enactment.—C.R.

sirable: *Provided, however*, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except

by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

Secs. 11-14. [Separability, appropriation, reconciliation, and repeal clauses.]

[Approved June 21, 1934.]

On April 10, 1936, Congress added Title II, bringing air-carriers under the act, permitting the creation of boards of adjustment by agreement, and permitting the Mediation Board to create a "National Air Transport Adjustment Board." Air-carrier cases which had been brought under the National Labor Relations Act were to be transferred to the National Mediation Board. As we shall see, it was also proposed to bring the merchant marine under the act, and, in 1940-41, defense industries.

In March, 1941, Supreme Court held, in *Moore v. Illinois Central*, that an employee could sue for his rights under a collective agreement without first using the boards set up by the Railway Labor Act.

III. MEDIATION AND STRIKE LIMITS IN THE MARITIME INDUSTRY

Labor relations in the maritime industry are under the charge of a Maritime Labor Board created in 1938, which deals both with sailors and other seafarers and with longshoremen or stevedores. Of the two groups, the seamen have long been subject to restrictions of the sort to discourage strikes and collective bargaining, for work stoppage on their part was likely to be regarded as mutiny. The relative freedom to quit that was finally given to American seamen by the LaFollette Seamen's Act of 1915 was mostly an individual freedom and did not change very much their chance to organize and strike.

The war of 1917-18 brought a situation favorable to unions in the maritime field just as it did in the railroad and other fields. The labor market was tight and government intervention and regulation was likely to mean union recognition. The United States Shipping Board had broad power to fix seamen's working conditions, but it held back and

tried to get unions and management to agree on something. As a large operator of vessels, the Board subscribed to the collective agreements itself.

Similarly, in the longshore field the government set up a tripartite National Adjustment Commission to act as a court of last resort for problems that had not been settled locally.

The 1920's saw a decline of unions and collective bargaining, the hand of the government having been withdrawn and the post-war boom being followed by a considerable depression in 1921. The Shipping Board continued to exist and operate or rent out ships that the government had acquired during the war, but its policy no longer seemed to favor collective bargaining. The Seamen's union charged that the Board's Sea Service Bureau (an employment agency or hiring hall) discriminated against union men.

In 1933 the Board was merged into the

Department of Commerce. Revived unionization threatened to lead to strikes. The federal government once more had to intervene

to prevent suspensions and, as in the railroad industry, it undertook to safeguard the employees' freedom to join a union.

MARITIME LABOR IN 1934-39¹

The record of governmental action with regard to the maritime industry since 1934 is contained in the activities of four major agencies which have been set up to deal with various phases of the maritime labor problem. These are: (1) The National Longshoremen's Board, a temporary body appointed by the President to deal with the strike of waterfront workers on the Pacific coast in 1934; (2) the National Labor Relations Board, a permanent body established in 1935 to administer the National Labor Relations Act, which includes maritime workers within its scope; (3) the United States Maritime Commission, a permanent body which administers the Merchant Marine Act of 1936; and (4) the Maritime Labor Board, set up in 1938 to encourage the making and maintaining of written agreements and to settle disputes in certain branches of the maritime industry, pending permanent legislation.

THE NATIONAL LONGSHOREMEN'S BOARD

There was not time between the passage of the National Industrial Recovery Act and the date when it was declared unconstitutional by the Supreme Court for the completion and approval of a code of fair competition for the shipping industry. Technically, therefore, the guarantee of collective bargaining contained in that act never applied to seamen, longshoremen, or harbor workers except in those cases where their employers voluntarily subscribed to the Presidents' Re-employment Agreement.² But the psy-

chological stimulus that section 7 (a) gave to labor organization influenced maritime workers as profoundly as it did workers employed in industries for which codes were approved. The struggle between militant labor organizations intent upon winning recognition in the form of written agreements and equally militant employers determined not to grant such recognition came to a head on the Pacific coast in May 1934. The International Longshoremen's Association demanded wage increases, a 6-hour day, union control of hiring halls, and a closed-shop contract. When the employers refused, a strike was called. Within a few weeks a stoppage involving both longshoremen and seamen at all Pacific coast ports had developed and shipping was tied up for almost 3 months. The climax was reached in a brief general strike of all labor unions in the San Francisco area.³

So complete was the stoppage of shipping and so violent the conduct of the dispute on both sides that the President of the United States appointed the National Longshoremen's Board to intervene, after a mediation board which had been appointed to avert the strike had proved unable to bring about a settlement of the issues. Upon the termination of the general strike the longshoremen and the water-front employers agreed to submit the issues in dispute between them to arbitration by the National Longshoremen's Board. This was done with the understanding that the strike would be immediately terminated and that the award of the Board would be binding

¹ U. S. Maritime Labor Board, *Report to the President, March 1, 1940* (Washington: Government Printing Office, 1940), pp. 39-44.—C.R.

² Of 27 shipping codes submitted, only that of the Inland Water Carriers operating via the New York Canal System was approved. Information as to how many employers of maritime labor subscribed

to the President's Re-employment Agreement is not available.

³ The longshore and general strikes are described in Chapters 1 and 3.—C.R.

upon the longshoremen and their employers. The seamen agreed to return to work at the same time with the understanding that questions of hours, wages, and working conditions would be submitted to arbitration in the event that collective bargaining with the chosen representatives of the seamen did not end in agreement. To determine the identity of the representatives, the Board conducted a coast-wide poll in which more than 12,000 seamen cast votes; these votes were never fully tabulated, mainly because the International Seamen's Union was recognized as the representative for collective bargaining by nearly all of the shipowners except those in the oil-tanker trade. The questions on which the union and the shipowners could not agree, following the recognition of the International Seamen's Union, were subsequently disposed of in an arbitration award by a special tribunal.

The arbitration proceedings occupied the National Longshoremen's Board for several months. The resulting award represented substantial gains for the International Longshoremen's Association. The Board's award provided, among other things, that hiring halls for longshoremen should be operated jointly by the longshoremen's union and the employers' association, but that the dispatchers in the hiring halls should be selected by the union.⁴ The award also granted the longshoremen wage increases and the 6-hour day. In addition it provided for the establishment of port labor relations committees on which the union and the employers were to have equal representation, and provision was made that all issues not decided by such committees should be submitted to arbitration. The fundamental issues of union recognition and written agreement were thus settled

favorably for both the seamen's and longshoremen's organizations.

Although this Board was created expressly to settle the waterfront strike, it engaged in a second significant task affecting seamen. Before its dissolution in 1935 the Board conducted an election of representatives for collective bargaining among the seamen employed in the Pacific coast oil tanker trade. Of 977 seamen on tankers who cast ballots, 709 voted for representation in collective bargaining by the International Seamen's Union. This union was therefore certified as the duly chosen representative of the seamen employed on tankers. It proved impossible to negotiate an agreement acceptable to both the union and the operators, however. A strike ensued in the spring of 1935 and a special mediation Board was appointed by the Secretary of Labor. But this body likewise failed to bring about a settlement.

THE NATIONAL LABOR RELATIONS BOARD

Under the wide interpretation of the term "interstate commerce" in the Supreme Court decisions of 1937 by which the National Labor Relations Act was upheld, the authority of the National Labor Relations Board extends not only to manufacturing, mining, trade, finance, and agriculture, but also to the maritime industry. Aside from businesses falling outside the scope of "interstate commerce," the only employers not subject to the act are those specifically exempted by section 2 (2); i. e., the Government of the United States or of any State or political subdivision thereof, together with carriers subject to the Railway Labor Act. Although it is clear that this exemption applies to railroad carriers in their capacity as employers of vessel personnel and of wharf, dock, and other harbor labor, it has not been determined judicially whether or not it also applies to the United States Maritime Commission in its capacity as a shipowner operating mer-

⁴ Where hiring halls were operated on the Pacific coast before the strike, they were controlled exclusively by employers.

[See *Anderson v. Shipowners*, 272 U. S. 359 (1926) and 27 Fed. (2d) 163 (1928).]

chant vessels for its own account through managing agents.

The activities of the National Labor Relations Board in relation to maritime workers are three. First, the Board defines the appropriate unit for collective bargaining. Second, the Board conducts elections to determine what organization shall represent maritime workers in collective bargaining. Third, the Board rules on complaints in which maritime workers have charged their employers with engaging in unfair labor practices.

THE UNITED STATES MARITIME COMMISSION

The Maritime Commission, as constituted under the Merchant Marine Act, 1936, is on the one hand a Government functionary charged with the duty of promoting the growth of the American merchant marine largely through ship construction and ship operation subsidies. On the other hand it is the owner of many merchant vessels, some of which are operated by corporations in which the Commission owns the majority of the common stock, some of which are chartered to private operators, but others of which are operated by managing agents for the Commission's own account. In this latter capacity the Commission has been brought into controversy with the labor unions of the seamen over the question of its status as an employer of maritime labor.

Though disclaiming any intention to interfere with the process of collective bargaining or to hinder the development of stable unionism,⁶ the Commission adopted a labor policy diametrically opposed to that taken by the United States Shipping Board in 1917-21. The Commission held that both the licensed and unlicensed members of the crews working on vessels operated for the account of the Commission had the status of Government em-

ployees. On the ground that the United States Government does not engage in collective bargaining with the organizations of Federal employees to which its members belong, the Commission has refused to enter into collective agreements with the unions of maritime workers. Without regard to membership in a union, the Commission has followed the policy of hiring its unlicensed personnel from the registers of seamen maintained by the United States shipping commissioners at the various ports, instead of submitting its crew requirements to the hiring halls maintained by the seamen's unions. Despite the stand taken by the National Labor Relations Board in interpreting those provisions of the National Labor Relations Act which exempt the Government as an employer of labor from the force of that act, the Commission has held that the statutory guarantees of the right of collective bargaining do not extend to seamen employed on vessels forming part of the fleet operated directly for the Commission's account and in competition with vessels operated by private shipowners. The attitude of the Commission toward collective bargaining is particularly significant because in addition to setting the wage rates, manning scales, hours of work, and other working conditions for crews of its own fleet, the Commission is empowered by the Merchant Marine Act to prescribe the minimum standards of wages, manning, and quarters which shall prevail on privately owned vessels in foreign trade receiving an operating differential subsidy.

As a result of the Commission's stand on collective bargaining under the National Labor Relations Act and the use of union hiring halls, its relations with the National Maritime Union on the Atlantic coast as well as with the Sailors' Union of the Pacific have become strained. On the Atlantic coast the National Maritime Union has been pressing for legislation to require the Commission to employ sea-

⁶ U. S. Maritime Commission, *Economic Survey of the American Merchant Marine*, p. 49.

men for its own fleet through union hiring halls and accept the obligations of the National Labor Relations Act. Pending such legislation the National Maritime Union has sought to persuade the National Labor Relations Board to enforce on Government-owned vessels operated by managing agents for the Commission's account, the rights of collective bargaining as guaranteed to seamen by the National Labor Relations Act. In 1939 efforts of the Maritime Commission to organize an American-flag service between ports on Puget Sound and those of the Far East brought it into conflict over the hiring hall issue with the Sailors' Union of the Pacific and with other maritime labor unions active in that region.

THE MARITIME LABOR BOARD

Establishment of the Maritime Labor Board in 1938 represents an effort on the part of the Government to reaffirm the public policy of collective bargaining in the maritime industry, thus bringing this industry into line with the general public policy of the Federal Government.

Prior to the creation of the Maritime Labor Board in 1938, the Conciliation Service of the Department of Labor was the only Federal agency with continuous authority to engage in the adjustment of labor conflicts in the maritime industry. Its intervention in maritime disputes was and is, however, only a small part of its broad function of making adjustment facilities available to all industries, occupa-

tions, trades, and crafts in the United States.

Under title X of the Merchant Marine Act, by which the Maritime Labor Board is established, it has been free to act not only in disputes involving the merchant marine engaged in foreign, coastwise, inter-coastal, and the Great Lakes trade, but also in disputes involving longshoremen and harbor workers at ports on all the seaboard and the Great Lakes. Thus when engaged in mediation work, the Board's activities have in part overlapped and in part supplemented those of the United States Conciliation Service. Notwithstanding the fact that section 1004 of title X makes it the duty of the Board to encourage employers and employees to settle all disputes, the act neither vests the Board with exclusive jurisdiction over maritime labor disputes nor excludes the intervention of any other governmental agency in controversies of this kind.

There are two segments of water transportation which do not fall within the purview of the Maritime Labor Board. These are: (1) Inland water transportation other than that on the Great Lakes or at other inland ports, and (2) water transportation subject to the Railway Labor Act. Disputes falling within the first segment of the industry now come under the aegis of the United States Conciliation Service. Those belonging to the second group are dealt with by the National Mediation Board established by the Railway Labor Act passed in 1926 and amended in 1934. . . .

MARITIME LABOR-RELATIONS LEGISLATION

The Merchant Marine Act of 1936 gave the Maritime Commission power to fix minimum wages and working conditions for ships receiving federal subsidies, and since these are a large proportion of all American ships, its announced wage scale in effect governs the seamen's wages.

The amendment of 1938 (Title X, referred

to above) declared that it was Congress' intent to have disputes settled through collective bargaining. It left the holding of collective-bargaining elections with the National Labor Relations Board. It created the Maritime Labor Board and made it its duty to encourage maritime employers to avoid suspensions and to exert every reasonable effort

to make written agreement about wages and conditions, including provisions for settling minor disputes over interpretation by means of adjustment boards or port committees. Every maritime employer has to file his collective contracts with the Board.

It is the employer's duty, within five days after receiving from a union a request for a conference, to specify a time and place for a meeting. It is the Board's duty to mediate at the request of either side and it may mediate also on its own volition. If both sides request it, it is to interpret a collective agreement about the meaning of which they disagree. If mediation fails, the Board is to recommend arbitration.

Congress instructed the Board to recommend a permanent maritime labor policy and accordingly the Board on March 1, 1940, published a review of the industry and its industrial relations,¹ including a number of proposals to amend the law just summarized. A few of these are given here.²

1. *The Maritime Labor Board, or its successor, should be authorized to consider and determine questions concerning representation of employees of maritime employers [instead of the National Labor Relations Board³]. . . .*

2. *The navigation laws of the United States or any other laws relating to seamen should not be so construed as to abrogate the right of seamen to strike in domestic harbors.*

The language of section 1002 pertaining to the National Labor Relations Act was obviously intended to protect seamen against unfair labor practices as they are defined in that act and to safeguard the right of seamen to organize and bargain collectively through their chosen representatives. But the provision of this section which reads, "That nothing in this title

shall constitute a repeal or otherwise affect the enforcement of any of the navigation laws of the United States or any other laws relating to seamen," has cast some doubt upon the right of seamen to strike in domestic harbors when the vessel affected by the strike is safely moored to the dock. This doubt has arisen principally because of administration of the law relating to the creation of marine boards to investigate acts of incompetency or misconduct not committed in connection with a marine casualty or accident. This law reads in part as follows:

(b) The Secretary of Commerce shall establish rules and regulations for the investigation of marine casualties and accidents not involving loss of life, any act in violation of any of the provisions of this title or of any of the regulations issued thereunder, and all cases of acts of incompetency or misconduct committed by any licensed officer or holder of a certificate of service while acting under the authority of his license or certificate of service, whether or not any of such acts are committed in connection with any marine casualty or accident. . . .

Investigations of acts of incompetency and misconduct not committed in connection with marine casualties and accidents are made by boards, known as C boards, which are composed of representatives of the Bureau of Marine Inspection and Navigation, and appointed by the Director of that Bureau.

The law does not define "acts of incompetency or misconduct," but a survey of the charges preferred by the Bureau of Marine Inspection and Navigation in a number of C board cases seems to indicate that the Bureau construes the term as encompassing any behavior legally reprehensible under the navigation laws. This connotation brings within the purview of the C boards actions ranging from drunkenness and fighting among crew members to refusal in violation of articles, to obey a command issued by the master during a strike in a safe harbor.

The significance of these investigations for maritime labor arises from the fact that

¹ U. S., Maritime Labor Board, *Report to the President, March 1, 1940* (Washington: Government Printing Office, 1940).—C.R.

² *Ibid.*, pp. 5-8, 21-22.—C.R.

³ This is the only recommendation of the Board with which the National Maritime Union disagreed, according to the union's weekly.—C.R.

actions characterized as misconduct may occur in connection with strikes or other union activity directed toward establishing or enforcing the collective-bargaining rights guaranteed to labor.

The articles which all crew members in the foreign and intercoastal trade must sign provide, in part: ". . . the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master. . . ." This provision can be interpreted to make any refusal to obey a command while under articles an act of misconduct, even when such refusal takes place in connection with a lawful strike in a domestic harbor when the vessel is safely moored.

The Board is of the opinion that none of our navigation laws or other laws affecting seamen should be so construed as to make possible the suspension or revocation of certificates or licenses for engaging in lawful strikes.

It is the declared policy of the United States, as expressed in section 1001 of title X, ". . . to eliminate the causes of certain substantial obstructions to the free flow of water-borne commerce and to mitigate and eliminate these obstructions when they have occurred . . ." but it is not a part of this policy to prohibit lawful strikes by seafaring men. Thus, the purpose of title X is to eliminate, as nearly as is possible, the causes which may lead to strikes in the maritime industry, but not to penalize seafaring men for exercising their right to engage in lawful strikes when in their judgment such strikes are unavoidable as a means of protecting their economic interests. The recommendation of the Board that certificates and licenses of seafaring men should not be revoked for engaging in lawful strikes is fully in keeping with the declared policy of the United States, which seeks to establish peaceful labor relations in the maritime industry by means of advancing the prin-

ciples and practices of collective bargaining, rather than by imposing legal restrictions upon the rights of maritime employees which are not applicable to other workers. . . .

[The Board proposed a large number of other amendments.]

In addition to making these amendments immediately effective, there is need for a complete revaluation of our navigation laws and of other laws affecting seamen in the light of the expressed policy of the Congress of the United States to promote collective bargaining in the maritime industry as a means of insuring the uninterrupted flow of water-borne commerce. The studies and investigations undertaken by the Board with regard to the impact of laws pertaining to seamen upon collective-bargaining problems have brought into relief a series of pertinent questions which have led the Board to believe that at least some of these laws may need revision with a view to bringing them in line with modern conditions of water transportation and with modern concepts of employer-employee relationships. Among these questions are the following:

First, in what way does the requirement that seafaring men sign shipping articles conflict with the collective agreements which the seafaring men enter into with the shipowners?

Second, should the contents of shipping articles be revised to conform with modern conditions of water transportation, or should the requirement for signing shipping articles be entirely done away with?

Third, when does concerted economic action on the part of merchant seamen constitute a legal right and when can such action be construed as mutiny?

Fourth, is a command of a master of a merchant vessel "lawful" when such command infringes upon the rights of seamen collectively to refuse to perform

work in order to enforce a lawful economic demand?

Fifth, should the duties of Shipping Commissioners, as defined in the law of 1872, be revised to meet changed conditions which have resulted from the establishment of collective agreements between maritime employers and employees?

Sixth, is there still need for the maintenance of registers of seamen by Shipping Commissioners?

Except for its recommendations as regard the revocation or suspension of certificates or licenses of seafaring men when engaged in lawful strikes, the Board is not

at present prepared to answer the preceding questions or to make recommendations with regard to similar problems which have arisen in connection with its study of the legal status of seamen in relation to collective bargaining. The whole subject of the legal status of seamen in relation to collective bargaining needs to be looked into with a view to clarifying existing statutes and making them conform to the accepted legal and economic concepts of the rights of workers, including seamen, to organize for the advancement of their economic interests. . . .

OUTCOME OF MARITIME MEDIATION AND ARBITRATION

A discussion of several cases mediated by the Board will amplify and clarify its functions and procedures. These cases illustrate the activities of the Board in the performance of its duties to encourage and to assist in the making and maintaining of collective agreements and to aid all maritime employers and their employees "to settle all disputes, whether arising out of the interpretation and application of such agreements or otherwise."

1. *Contracting Stevedores, Ports of Milwaukee, Wis., and Chicago, Ill.—International Longshoremen's Association (A. F. of L.)*. In March, 1939, the services of the Maritime Labor Board were requested in connection with the renewal of agreements between the major stevedoring companies in the port of Milwaukee and the International Longshoremen's Association. The new agreement proposed by the union called for wage increases for straight and overtime, continuation of the union hiring hall, one additional holiday per year, and more favorable working rules. The employers felt that it was impossible to grant increases because of a "slow-down" on the

part of the longshoremen, which was resulting in greatly increased operating costs.

The Board entered the situation when a series of joint conferences had come to an impasse on the issue of wage increases. By means of separate conferences with representatives of each side, the Board's mediator was successful in preparing the way for a joint conference, which resulted in the signing of an agreement. By the terms of this agreement, the workers received an increase in overtime rates and an additional holiday. The employers received assurances that the "slow-down" would be eliminated, in addition to certain concessions on working rules tending to reduce operating costs.

In May of the same year, the same group of companies requested further assistance in renewing agreements with the International Longshoremen's Association covering the port of Chicago. With the aid of the Board, agreements were concluded.

2. *American Tankers Corporation—National Organization Masters, Mates and Pilots of America (A. F. of L.)*. The assistance rendered by the Maritime Labor Board in the negotiations between the American Tankers Corporation and the National Organization Masters, Mates,

¹ U. S., Maritime Labor Board, *Report to the President, March 1, 1940* (Washington: Government Printing Office, 1940), pp. 57-59, 168-72.—C.R.

and Pilots consisted of both mediation and technical aid in the formulation of agreements. The union had made its first attempt to establish contractual relations with the American Tankers Corporation and its affiliated companies in August 1938. It was unsuccessful, however, as the parties had failed to arrive at a definition of the issues. This was largely due to the failure of both sides to analyze and compare the terms of various current agreements in order to arrive at a satisfactory basis for negotiation. When the Board intervened it was able, by means of separate conferences with each side, to limit and narrow the field of controversy. The issues involved additional payments for pilotage by officers other than the captain, the closed shop, and the employment of relief officers in port or the payment of compensatory overtime in lieu of providing such relief officers. As no agreement could be reached on the last issue, negotiations were broken off for some time. Conferences were resumed in May of 1939, and with the assistance of the Board resulted in signed agreements. These were chiefly significant in that they set up contractual relations in a portion of the tanker trade which, as a whole, has been the slowest section of the maritime industry to come under collective agreements.

3. *Waterfront Employers Association of the Pacific Coast—International Longshoremen's and Warehousemen's Union (C. I. O.)*. The west coast longshore dispute between the International Longshoremen's and Warehousemen's Union and the Waterfront Employers Association of the Pacific Coast arose in connection with renewal of the collective agreement due to expire on September 30, 1939. While this section of the maritime industry, comprising some 13,000 men, has been operating under written agreements since the arbitration award of 1934, difficulty in renewing the agreement had been anticipated for some time. Several attempts to reach a settlement by direct negotiation

had ended in deadlock. The situation was made more difficult by an attitude of distrust on the part of both parties.

The chief demands made by the union concerned higher wages, the right to respect bona fide picket lines, joint control over the introduction of labor-saving devices, and the straight 6-hour day. The employers offered to renew the 1938-39 agreement or to submit all issues to arbitration.

As it became evident that negotiations could not proceed and that failure to agree on renewal by September 30 might result in a complete tie-up of the Pacific coast, the Maritime Labor Board offered its services to mediate the dispute. This offer was accepted by both sides, conditionally by the employers, whereupon the Board's representative called a series of joint meetings with a view to finding a basis on which negotiations could be resumed. An agreement was finally reached which provided for the indefinite extension of the existing agreement, with a 60-day termination clause to permit continuation of negotiations over the terms of a final settlement. It is probable that the intervention of the Board averted a coast-wide tie-up.

4. *Lykes Brothers Steamship Co.—National Maritime Union of America (C. I. O.)*. The assistance of the Maritime Labor Board was requested by the Lykes Brothers Steamship Co. on May 6, 1939, in connection with the maintenance of the terms of an agreement between that company and the National Maritime Union. The situation arose as the result of a strike by the seamen on the steamer *West Cobalt*, then in the harbor of Galveston, Tex., in violation of a provision prohibiting stoppages during the life of the agreement. The strike was called by the seamen because a tug used to tow the steamer had also been used to service tankers belonging to the Standard Oil Co. of New Jersey. This latter company was currently classified as "unfair" as a consequence of the east coast tanker strike then in progress.

This sympathetic action was supported by local union officials, who refused to replace the striking crew as requested by the employer.

The Board presented the situation to the national union officials in New York and asked co-operation in releasing the vessel. Recognizing the sanctity of contracts, the union made the necessary arrangements, permitting the vessel to sail.

5. *Savannah Maritime Association—International Longshoremen's Association (A. F. of L.)*. The services of the Maritime Labor Board were requested by the International Longshoremen's Association in October 1938, to terminate a strike of longshoremen in Savannah, Ga. The strike had been called when the union membership refused to ratify an agreement negotiated by the union and the deep-sea operators, represented by the Savannah Maritime Association. The union demands concerned wage increases, time and one-half for overtime, and the 8-hour day.

At the suggestion of the Board's representative, the union agreed to return to work pending the outcome of continued negotiations, provided the operators agreed to discharge nonunion men employed during the strike. These conditions were met, and the men returned to their jobs. After further discussion the union membership ratified the terms of the proposed agreement, which then went into effect.

6. *Seas Shipping Co.—National Maritime Engineers' Beneficial Association (C. I. O.)*. In February of 1939 the Board received a request from the Marine Engineers' Beneficial Association for its assistance in the conclusion of an agreement between that organization and the Seas Shipping Co. The union had been certified by the National Labor Relations Board as the collective bargaining representative of the company's licensed engineers some 2 years earlier. However, negotiations carried on intermittently after that

time had failed to produce a signed agreement. When the Board's services were requested, there remained only one deadlocked issue—the inclusion of an arbitration clause—which prevented the consummation of an agreement. The company refused to include such a clause, insisting that disputes arising under the agreement should be settled by recourse to the courts.

In accordance with section 1004 (1), title X, the Board pointed out the value of an arbitration clause in promoting greater stability of labor relations and succeeded in persuading the company to reconsider its stand. However, the union agreed to sign the contract without an arbitration clause, as it felt that successful experience under an agreement, combined with the company's more favorable attitude toward arbitration procedure, would result in the inclusion of such a clause in future agreements. . . .

INTERPRETATIONS ESTABLISHED BY ARBITRATION

The longshore employer-employee relationship on the west coast is governed by a number of factors—the collective agreement, the working, dispatching, and other rules in the several ports, and that frequently debated element known as customary or established port practice. These factors are not rigid but fluid, changing, from time to time, in response to new conditions, the needs of the industry, and the relative bargaining strength of the parties. All are subject to interpretation and modification by the process of arbitration. The 94 arbitration awards rendered during the past 5 years have built up a body of interpretations and principles constituting, in effect, a series of amendments to the collective agreements and to existing port rules and practices. Consequently, some knowledge of the substance of the awards is essential to an understanding of labor relations in this segment of the industry.

An exhaustive analysis of the awards is beyond the limitations of this report; first,

because of the difficulty and complexity of the task, and, second, because the propriety of such an attempt on the part of this Board or any other outside body may be questioned. Nevertheless, certain reasonably definite principles have emerged from the arbitration process during the past 5 years. It is believed that a summary statement of these will contribute to an understanding of the types of problem encountered and of the progress made toward solving them. In presenting the list the Board has no thought of assuming the role of arbiter nor of placing the seal of finality upon still controversial issues.

1. It is a coast-wide principle that work must continue pending adjudication of disputes. For either party to exercise force in the form of a strike or lockout prior to arbitration is contrary to the agreement. Neither party can justify an illegal stoppage of work on its part prior to arbitration, because, in its opinion, the other has violated the agreement. Individual workmen or even entire gangs may exercise their right to quit work if conditions on the job are not to their liking, particularly if they consider these conditions inimical to health or safety, but in such cases the union is bound to furnish replacements. However, it is recognized that it is possible to effectuate "joint action" by way of "individual action," and when facts show this to be the design, the plea of "individual action" must be viewed as a subterfuge. It is not necessary for the union officers to direct the men not to work to constitute illegal stoppage.

2. Discussion by representatives of both parties at a meeting of the Labor Relations Committee is not a necessary prerequisite to a deadlock requiring arbitration. A deadlock may be reached in several ways. An irreconcilable difference of opinion expressed in argument at a Labor Relations Committee meeting is the most common circumstance; however, immediate refusal of one party to discuss a proposal, or the refusal of one party, knowing an issue

is to be discussed, to attend the meeting would be subject to the same interpretation.

3. General issues or hypothetical questions unrelated to a specific dispute or unsupported by specific evidence are not arbitrable. The duties and powers of the arbitrator fall into two categories: (1) To arbitrate, in accordance with contract law, specific disputes involving a basic interpretation of the language of the agreement, and with this power, the duty to consider any question of mutual concern not covered by the contract which relates to the industry on a coast-wide basis and which arises out of a specific dispute; and (2) to arbitrate disputes in which allegations of specific violations of the agreement, not hypothetical violations, are filed.

4. The employers and the union have the right to be represented on the Labor Relations Committee by persons of their own choosing. This award does not, however, encompass a situation where the representatives of either party could be proved to be spies. If such a charge should ever be made the case would have to be arbitrated on its own merits.

5. There are legitimate picket lines and illegitimate picket lines. The right of a union to recognize the sanctity of a legitimate union picket line is a basic tenet of unionism.

Legitimate picket lines, which may be honored without violation of the agreement, include a line maintained by an affiliated local not party to the longshore agreement, in a legitimate labor dispute with an employer party to the agreement. However, refusal to pass a "ghost" picket line, after a legitimate line has been removed by court order, is in violation of the agreement.

Illegitimate picket lines have been found to include demonstration picket lines, picket lines growing out of jurisdictional disputes, picket lines formed by another longshore local also party to the agreement.

6. Under conditions where proceeding to work would entail a hazard to the safety or health of longshoremen, refusal to proceed does not constitute a violation of the contract.

7. Refusal to handle "hot cargo," if there is no other reason for such refusal, is an effort to exert pressure on longshore employers for the purpose of assisting another union to obtain what it seeks from other employers. Neither party has a right to violate the agreement for reasons foreign to the conditions upon which it has agreed contractually.

8. The scope of longshore work as defined under the agreement has been the subject of a number of awards. Since longshore work is defined under the agreements as encompassing all handling of cargo in its transfer from vessel to first place of rest or vice versa, including sorting and piling on the dock, and direct transfer of cargo from vessel to railroad car or barge and vice versa, these awards have concerned primarily the questions of what is the first place of rest on the dock in unloading cargo and the last place of rest on the dock in loading, and what constitutes direct transfer.

The awards have determined with reference to a place of rest that the length of time during which cargo is at rest is immaterial. It has also been decided that where cargo is unloaded from cars and placed on sling boards which are moved by a carrier to a point on the dock where the sling boards are piled, and subsequently picked up by a similar carrier and moved to the side of the vessel, the point where the sling boards are piled on the dock in the first movement is the last place of rest on the dock, and consequently the point where longshore work begins.

Direct transfer means moving cargo from the vessel to its immediate destination in a single operation. In direct transfers, longshore work begins with outgoing cargoes and ends with incoming

cargoes at the dock of the ship in question.

9. In accordance with the awards concerning the scope of longshore work, the movement of cargo from trucks or cars to liftboards in indirect movement² is not "longshore work" under the agreement. As stated under point 8, "longshore work" begins, in the case of outgoing cargo, only after the cargo has reached its last place of rest on the dock, and in the case of incoming cargo, ends at the first place of rest on the dock. However, if, in special circumstances, longshoremen are ordered to perform work in connection with the indirect movement of cargo which is not, technically speaking, "longshore work," it has been held that under the agreement of October 1, 1938, longshoremen are required to perform such work for the same rate of pay they received for "longshore work."

10. The employer is free under section 11 (d) of the October 1, 1938 agreement, to introduce labor-saving devices without any restrictions save those of safety and health. The increased use of liftboards has been the foremost issue in disputes concerning labor-saving devices. The union has urged that higher wages should be paid for these operations which reduce the amount of labor required. Under the agreement, however, such a demand has been found unwarranted.

The coast-wide decision of this issue took cognizance of the implications of these contractual obligations for the decasualization program, and suggested, by *obiter dictum*, the need for facing the problem of labor-saving devices in the negotiations of future agreements.

11. Under the October 1, 1938 agreement, the employers' right to establish the size of sling loads, with regard to com-

² Indirect movement refers to loading operations in which the cargo comes to a place of rest on the dock before being loaded on the vessel, and to unloading operations in which the cargo comes to a place of rest on the dock before being moved elsewhere.

modities for which maximum loads are not incorporated in the agreement, is limited by considerations of health, safety, and by the requirement that an additional criterion be applied; namely, the establishment of a reasonable loading and discharging rate under the working conditions applicable to the operation, including the number of men used.

12. Nine awards concerning nine different ports treat with the scope of cargo work to be performed by longshoremen and by crew members on steam schooners. Four of these awards provide for a division of work on the basis of hatches. In three ports the sailors are limited to one hatch, and in another to one hatch and one mixed hatch. The other five awards allow mixed gangs of sailors and longshoremen to be employed in any hatch.

The majority of these awards contain special provisions requiring the employment of longshore hatch tenders and winch drivers with longshore gangs, in which longshoremen constitute a majority, and, in one instance, with all mixed gangs.

13. It has been held that the union violates the agreement when it exercises coercion, duress, or threats in instances where, under the agreement, union members may make individual choices with regard to certain matters.

Two decisions exemplify this interpretation. Under the agreement and dispatching rules in San Francisco the men were free to choose to work in preferred

or extra gangs. The union, in advising its members by way of resolution that, in the opinion of its officers, the best interests of the union would be served if its members elected to work in extra rather than preferred gangs (a suggestion which culminated in the elimination of preferred gangs), was not in violation of the agreement.

Under the agreement between the Dock Checkers Employers Association of San Francisco and the Ship Clerks Association, International Longshoremen's and Warehousemen's Union, the men are free to accept employment on a monthly or daily basis. In advising ten union members, shortly after they accepted a change from a daily to monthly basis, to resign their monthly jobs, thus precipitating a situation which culminated in a strike, it was held that the union had violated the agreement.

This does not mean that the union cannot advise its members, but the point where advice and persuasion end and interference and coercion begin is a problem which can only be determined in the light of the surrounding facts in individual cases.

14. The giving by either party of a notice of desire to modify or terminate the agreement prevents automatic renewal of the agreement unless, following the giving of such notice and prior to the expiration date, the parties agree to continue under it, to modify it, or to extend the period for negotiation.

PENINSULAR & OCCIDENTAL STEAMSHIP COMPANY *v.* NATIONAL LABOR RELATIONS BOARD

U. S. Circuit Court of Appeals (Fifth Circuit). 1938.
98 Fed. (2d) 411.

The following opinion, though acknowledging that the National Labor Relations Board has jurisdiction to guard the rights of unionists in the maritime industry, indicates that the Board's actions must be subordinated to the essential-service character of the indus-

try and that the employers have a need to be free to select responsible employees.

* * * *

FOSTER, Circuit Judge: . . .

The Board found that certain named

members of the crews of the steamships *Florida* and *Cuba* were discharged for the reason that they had joined and assisted the National Maritime Union, which was an unfair labor practice in violation of Section 8(1) of the National Labor Relations Act. The decision rests solely on this finding. The Board entered the usual order to cease and desist and post notices; and ordered the company to offer re-employment to some 145 members of said crews, without prejudice to their seniority or other rights and privileges, discharging if necessary those who had been hired to replace them, and to reimburse the discharged members of said crews for losses of pay and the reasonable value of maintenance on shipboard. . . .

The material facts are as follows. The company owns the steamships *Florida* and *Cuba* which operate on fixed schedules, making two or three trips a week, from Miami and Port Tampa, Florida, to Havana, Cuba, and return, carrying freight, express, passengers and the mail. All the members of their crews signed the usual shipping articles required by the navigation laws. On June 4, 1937, every member of the crews of the vessels, from the captains down, were members of labor unions, affiliated with the American Federation of Labor, with which unions the company had unexpired contracts fixing hours, wages and working conditions. These contracts were not outright closed shop agreements but they provided that the union had the right by preference to fill vacancies in the crew from its members, if competent men could be supplied. At the time these contracts were made the National Maritime Union, affiliated with the Committee for Industrial Organization, had not been organized.

On June 4, 1937, while the *Florida* was at dock in Miami, Marcus Elliott, a delegate of the National Maritime Union, requested permission to go on board the ship. Permission was denied by the master and local superintendent but in an

hour or so was granted by superior officers of the company, when the request was brought to their attention, and he went on board and talked to the men. The members of the crew in the stewards' department and the unlicensed members of the deck and engine room crews were then members of the International Seamen's Union. In the afternoon, shortly before sailing time, certain members of the crew demanded, through Elliott, that the company recognize the National Maritime Union and that Elliott be permitted to transfer the union books of the crew from the International Seamen's Union to the National Maritime Union before the ship sailed. This was denied on the ground that the company had a preferential contract with the International Seamen's Union. However, Elliott was offered a pass to go on the voyage and change the books en route but declined. There was no complaint as to hours, wages or working conditions. The company requested the crew to take a ballot to determine which union was in the majority. This was refused. The members of the crew of the *Florida* who desired to change their affiliation to the National Maritime Union refused to do any work, went on a sit-down strike, took possession of the ship, refused to let the electrical equipment furnishing light or the pumps supplying the sanitary arrangements of the ship be used, and refused to permit any food to be served to anyone but themselves. The ship was prevented from sailing and the passengers had to be sent ashore and housed at the expense of the company. This resulted in suits for damages for delay. News of this strike was communicated to the crew of the *Cuba*, at Port Tampa. Practically all the unlicensed members of the deck and engine room crews and of the stewards' department on the *Cuba* decided to transfer their membership from the International Seamen's Union and also went on a sit-down strike for the recognition of the National Mari-

time Union. The company wired the Board asking it to designate the bargaining agency for the crews. The Board declined, referring the request to the Department of Labor. The strike was settled through the intervention of a conciliator of the Department of Labor, the company agreeing to not discriminate against the strikers. The ships resumed their regular schedules. However, the dispute between the rival unions was not permanently settled and friction continued on the ships between their members.

About June 19, 1937, the members of the crew of the *Cuba* who still adhered to the American Federation of Labor unions refused to sail with the members who had joined the National Maritime Union and those in the engine room crew went on a sit-down strike. The ships were then temporarily laid up by the company and the entire crews of both vessels were discharged. The International Seamen's Union demanded the right to supply crews for the vessels under their preferential contract and were permitted to do so. The ships again resumed their regular schedules and there was no further trouble. . . .

[The company claimed that the men's employment expired at the end of the voyage, under the "ship's articles," so that it did not discharge them but only failed to rehire them.] The Board concluded it was immaterial that the crews had signed shipping articles, on the ground that the company had not made it a practice to terminate the employment of the crew at the end of each trip. . . .¹

The shipping articles . . . were signed . . . for voyages from Miami or Tampa, Florida, to Havana, Cuba, and such other ports and places in any part of the world as the master might direct, and back to

a final port of discharge in the United States, for a term of time not exceeding twelve calendar months. These shipping articles constituted individual contracts between the owners of the vessels and the crew, terminable at the will of either at the end of any voyage in the ports of Tampa or Miami. *The Thomas Tracy*, [24 Fed. (2d) 372], and authorities cited there. . . .²

The Board gave weight to the testimony tending to show [officers'] remarks derogatory to the National Maritime Union and threats of discharge, and no weight to the testimony in rebuttal; dismissed the sit-down strikes as a closed incident not affecting the case; held the evidence that the men were contemplating further sit-down strikes and sabotage unconvincing; held that there was no evidence to show the crew was incompetent; and that there was evidence to the contrary.

Conceding that the Board had the right to pass upon the credibility of the witnesses and reject testimony it did not believe, giving the testimony on behalf of the crew tending to prove persuasion to withdraw from the National Maritime Union and threats of discharge if they did not do so full weight, it amounts to no more than evidence of intent. Furthermore, it is susceptible of the construction that the officers of the ship were indulging in propaganda for their own unions, something in the nature of peaceful picketing, which is protected by law.

The evidence tending to prove threats of sabotage and further sit-down strikes was admissible to show that the threats had been communicated to the officers of the ships. Whether they were actually uttered is immaterial if they were communicated to the officers of the ships, were believed by them and acted upon in dis-

¹ The Supreme Court later upheld the Board's view that the men's employment did not automatically cease with the expiration of ship's articles. *N. L. R. B. v. Waterman Steamship Company*, 309 U. S. 206 (1940).—C.R.

² Under the National Labor Relations Act a contract terminable at will may not be terminated by a company because of the employee's union membership. Does this court hold that the contracts were ended for such reasons, or for some legitimate reason?—C.R.

charging and refusing to reinstate the members of the crew.

The owners of vessels, their masters and other officers, are required to exercise the highest degree of care and skill for the preservation of the lives of passengers and crews and to safely transport the cargo. This duty is superior to all other considerations in the operation of ships. Implicit obedience to the lawful orders of the master is required on a vessel. Without that there would be no safety. Engaging in sit-down strikes and taking possession of the ships, in defiance of their officers, was at least prima facie evidence that the crews were guilty of mutiny. . . . *Hamilton v. U. S.* [268 Fed. 15; the Supreme Court refused to review the decision. 254 U. S. 645]. It is true these strikes had been settled without charges being made against the men but their actions in that respect would form a basis for considering their future attitude. A ship that is not manned by a competent crew is unseaworthy. . . .

. . . The possibility of danger could be attributed to the members of both unions. Therefore, it can not be said that it was not a necessary measure for the safety of the ships that the company could discharge the entire crews and replace them with other crews that would not be torn by dissension and probably be mutinous. . . .

When the Board declined to designate the bargaining agency, as it had authority to do, the company was not required to indefinitely continue the operation of its business under conditions it deemed unsafe. It was not the province of the Board to substitute its opinion for the considered judgment of the company in this respect. . . .

. . . The Act does not prohibit contracts with individual employees. Nor does it interfere with the normal right of an employer to select his employees or discharge them. *Nat. Labor Rel. Bd. v. Jones & Laughlin*, 301 U. S. 1. Not only did the company have the right to make

individual contracts, evidenced by the shipping articles, but was required by law to do so. The right to discharge one or all the members of the crew at the home port at the end of the voyage was a legal right unimpaired by the Labor Relations Act. The exercise of that right could not, standing alone, be considered coercion. *Coppage v. Kansas*, 236 U. S. 1. The company was amply justified in discharging the crews for the benefit of the public. No other bargaining agent having been designated by the Board, in employing new crews the company was bound by its contract to give preference to the International Seamen's Union. Had it not done so it would have been subject to charges for violating the Act.³

The Board found that members of the crew were discharged for the reason that they had joined and assisted the National Maritime Union, which was an unfair labor practice in violation of section (8)1. That the members of the crew were discharged and not reinstated is undisputed, but the gist of the unfair labor practice is that they were discharged on account of union membership or activity. The reason for their discharge is the principal issue in controversy, and if they were discharged on account of threats of sabotage, etc., and not on account of union membership or activity, there was no unfair labor practice.

On all the evidence in the case, the company, in the circumstances shown, was not guilty of violating the National Labor Relations Act. The findings of the Board are not supported by evidence within the meaning of the law.⁴ It follows that the

³ The act does not undertake to enforce collective agreements.—C.R.

⁴ It will appear in the next chapter that, Congress having said that the Board's findings of fact were to be conclusive if supported by evidence, a large question is whether the courts will interpret this clause in such a way as to find in many cases that the Board's findings are not backed by "substantial evidence." The Supreme Court has found so in few

petition of the company to annul and set aside the order must be granted and the application of the Board to enforce the

cases. See *N. L. R. B. v. Waterman Steamship Company*, cited above.—C.R.

order must be denied. There will be judgment accordingly.⁵

⁵ The Supreme Court refused to review the case.—C.R.

IV. STATE COMPULSORY-INVESTIGATION LAWS

In 1937, when the Supreme Court held the National Labor Relations Act to be constitutional, several states passed laws almost identical with it. This spring of 1937 was a time of business boom and many strikes. While these labor-relations laws were thought by some to be likely to prevent certain sorts of strikes, the drive toward strike-prevention largely expressed itself in more orthodox ways. A number of states revamped their mediation systems. New penalties on various sorts of strike activities were considered and Michigan's legislature passed a bill which limited anti-union discrimination by employers but also limited union activity; it was vetoed by Governor Murphy, after protests by labor unions.

Though to a large extent the strike-wave died away after the middle of 1937, businessmen resented the labor-relations laws and the help they gave unionists, and a drive was begun to amend these laws and add to them restrictions on unions. A favorite proposal was that of the cooling-off period, accompanied by mediation and investigation, like that found in the railroad law. When the legislative year 1939 came, cooling-off was included in several of the laws that were passed, among them Michigan's, which, as we shall see, included also a number of new penalties for union violence and, as well, the provision which is basic to the labor-relations laws, namely, a ban on company discrimination against union membership.

MICHIGAN'S COMPULSORY MEDIATION AND INVESTIGATION LAW

Michigan Statutes, Annotated, §17.454;
Public and Local Acts of Michigan, 1939, No. 176.

The People of the State of Michigan enact:

SEC. 1. It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes; that strikes and lock-outs and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state.

SEC. 2. When used in this act, unless the language or context indicates otherwise:

(a). The term "company union" includes any employe association, committee, agency, or representation plan, formed or existing for the purpose, in whole or in part, of dealing with employers concerning grievances or terms and conditions of employment, which in any manner or to any extent, and by any form of participation, interference or assistance, financial or otherwise, either in its organization, operation or administration, is dominated or controlled, sponsored or supervised, maintained, directed, or financed by the employer;

(b). The terms "dispute" and "labor dispute" shall include but are not restricted to any controversy between employers and employes or their representatives as above defined, concerning terms,

tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining or changing terms or conditions of employment;

(c). The term "board" means the labor mediation board created by section 3 of this act;

(d). The term "commission" means any special commission appointed by the governor under the provisions of this act.

SEC. 3. There is hereby created a state board to be known as the labor mediation board, which shall consist of three members appointed by the governor, with the advice and consent of the Senate. Each member shall be a citizen of the United States and a resident of the State of Michigan, and shall have been a qualified elector in the state for a period of at least five years next preceding appointment. In order to insure impartiality, members of the board shall be selected without regard to political affiliations. . . .

SEC. 8. It shall be lawful for employees to organize together or to form, join or assist in labor organization, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their employers through representatives of their own free choice.

SEC. 9. In the event a dispute arises, and the parties thereto are unable to settle the same, no strike or lockout shall take place or be put into effect unless in case of an impending strike the employees, or their representative, or in case of an impending lockout the employer or his agent shall serve a notice upon the board of such dispute together with a statement of the issues involved. Said notice may be served on any member of the board, or sent by registered mail to the board.

SEC. 9a. For a period of not less than five days after the above notice is served, or until the board undertakes the adjustment and settlement of the dispute should

said board undertake such adjustment or settlement within five days, it shall be the duty of both employees and employers to use their best efforts to avoid a cessation of employment or a change in the normal operation of the business, and during said period the parties to said dispute shall undertake a mediation thereof. Violation of this section shall be a misdemeanor and punishable as such.¹

SEC. 10. After the board has received the above notice, or upon its own motion, in an existing, imminent or threatened labor dispute, the board may and, upon the direction of the governor, the board must take such steps as it may deem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threatened to precipitate or culminate in such labor dispute. To this end, it shall be the duty of the board:

(a). To arrange for, hold, adjourn or reconvene a conference or conferences between the disputants and/or one or more of their representatives;

(b). To invite the disputants and/or their representatives to attend such conference and submit, either orally or in writing, the grievances of and differences between the disputants;

(c). To discuss such grievances and differences with the disputants or their representatives; and

(d). To assist in negotiating and drafting agreements for the adjustment or settlement of such grievances and differences

¹ A union complained to the Michigan Labor Mediation Board that the Johnson Milk Company had disturbed the existing situation during the cooling-off period, after the union had announced its intention to strike; the company discharged members and also signed a contract with a rival union. The Board ruled that the discharge disturbed the situation, but that it had no power to act against the discharge. Under the statute the union could have a misdemeanor charge brought against the company. The Board ruled that the making of the contract, while it did not conduce to friendly relations with the union, was not a "disturbance." 5 Labor Relations Reporter 373 (1939).—C.R.

and for the termination or avoidance, as the case may be, of the existing or threatened labor dispute.

In carrying out any of its work under this act, the board may designate one of its members or an officer of the board to act in its behalf and may delegate to such designee one or more of its duties hereunder and, for such purpose, such designee shall have all of the powers hereby conferred upon the board in connection with the discharge of the duty or duties so delegated.

SEC. 11. The board and each member thereof and each person designated thereby shall have power to hold public or private hearings at any place within the state, subpoena witnesses and compel their attendance, administer oaths, take testimony and receive evidence. Subpoenas may be issued only after the mediation of a dispute shall have been actually undertaken.

SEC. 13. In the event a dispute should arise between employees and employer, where the employer is operating a public utility, or hospital, or any other industry affected with a public interest ² and before any strike shall be engaged in or put into effect or before any lockout or change in normal operations shall be made, the notice provided in section 9 hereof must be given and there must be no interference with production for a period of 30 days from the giving of such notice, during which time the governor shall appoint three qualified and disinterested residents of the state as a special commission which shall undertake to mediate the dispute. Said special commission may prescribe rules and regulations governing procedure, and may incur such expenses as shall be necessary to be paid as a part of the expenses of the board provided for by this act. The findings of said commission shall be reported to the governor. Failure to

give the notice as provided for in this section shall be a misdemeanor and punishable as such.

SEC. 14. Nothing in this act shall be construed to interfere with the right of an employer to enter into an all-union agreement with one labor organization if it is the only organization established among his employees and recognized by him, by consent, as the representative of a majority of his employees; nor shall anything in this act be construed to interfere with the right of the employer to make an all-union agreement with more than one labor organization established among his employees if such organizations are recognized by him, by consent, as the representatives of a majority of his employees.

SEC. 15. It shall be unlawful for any person to enter or take part in entering upon or take possession or control of any property or withhold possession of property, against the will of the owner thereof, or other person in the rightful possession or use thereof, or interfere with the free use thereof, whether the same be accomplished by force, threats, intimidation, artifices or stratagem. Violation of this provision shall be a misdemeanor and punishable as such.

SEC. 16. It shall be unlawful for an employer to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization; to discriminate in regard to hire, terms or other conditions of employment in order to discourage membership in any labor organization; or encourage membership in, or initiate, create, dominate, or contribute to a company union; or to discriminate against an employe because he has given testimony before the board or commission. Violation of this section shall be a misdemeanor and punishable as such.

SEC. 17. It shall be unlawful for any employe or other person by force, coercion, intimidation or threats, to force, or attempt to force any person to become or remain a member of a labor organization,

²In February 1941 the Board ruled that plants doing defense work were affected with a public interest under section 13.—C.R.

or for any employe or person by force, coercion, intimidation or threats, to force or attempt to force any person to refrain from engaging in employment. Violation of this section shall be a misdemeanor and punishable as such.

SEC. 18. If any provision of this act, or the application of any provision to any person or circumstance, shall be held invalid, the remainder of the act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 19. This act shall be deemed an exercise of the police power of the state of Michigan for the protection of the public welfare, safety, prosperity, health and peace of the people; and all the provisions of this act shall be liberally construed for the accomplishment of said purposes.

SEC. 20. The expenses of carrying out the provisions of this act shall be paid from appropriations made therefor by the legislature. The provisions of this act shall not apply to employes or employers under the jurisdiction of the railway labor act nor to any dispute between employers or employes involving farm labor or domestic employment.

.....

This act is ordered to take immediate effect.

[Approved June 8, 1939.]

* * * *

The Michigan law had been preceded on April 22, 1939, by a somewhat more elaborate Minnesota law. One of its clauses provided for a labor conciliator. Another provided that unions were to give written notice to employers when they wanted to change terms of work; that it was then the employers' duty to negotiate in good faith. The same pattern was to prevail when the employer wanted new terms. If, after ten days, negotiation did not produce an agreement, either side could notify the other that a suspension was coming after another ten days. Notice was to go also to the state labor conciliator and he was to mediate during this ten-day period.

If the dispute was in a business affected with a public interest, so that a suspension would endanger public well-being, investigation was to be tried if necessary: The conciliator would notify the governor, who could appoint a commission of three (labor, capital, public) with the power of subpoena; suspension would be forbidden during thirty days while the commission investigated and, if the governor chose, published its findings on the issues and also the merits of the dispute.

Violation of these cooling periods was to be counted an unfair labor practice; an injunction could be sought against it from a court. Moreover, a violator was not to receive any of the benefits of the act—that is, if *he* sought an injunction against his adversary for any of the unfair labor practices mentioned in the act, the adversary could argue that he came into court with unclean hands. For instance, an offending union could not push a discrimination case; an offending employer could not invoke the statute against picketing by outsiders.

At about the same time, Wisconsin and Pennsylvania amended their labor-relations acts drastically and Wisconsin included a clause which echoed the Minnesota mediation provision. It made it an unfair labor practice to strike without ten days' notice to the mediation board, in the production, harvesting, or initial processing of farm products. Massachusetts passed a law requiring the state Board of Conciliation to investigate and report on the merits of a labor dispute when a city or town official asked it to.

In 1941, at a time when strikes in defense industries were worrying the country, New York passed a law permitting the commissioner of labor to appoint investigation boards with the power of subpoena, in cases of serious labor disputes. The boards were to make their recommendations public if the parties did not reach an agreement within a reasonable time. No cooling-off period was prescribed.¹

At about the same time Michigan's mediation board ruled that companies working on defense orders were "essential" and so were under the 30-day rule.²

¹ Chapter 143, New York Laws of 1941, approved March 24, 1941.—C.R.

² See also the first page of this chapter, at footnotes 2 and 3.—C.R.

V. LIMITS ON UNIONS IN WAR AND DEFENSE INDUSTRIES

The declaration of Congress in April, 1917, that a state of war existed, automatically limited strikes, since more and more industries appeared to be related to defense production and strikes seemed somewhat unpatriotic. However, since costs of living were rising rapidly, and booming business increased business profits and labor's bargaining power, workers were tempted to subordinate patriotism to self-interest. There were somewhat more recorded strikes in 1917 than in 1916. Though the number sank in 1918, the number of workers involved in strikes was about the same in 1917 and 1918. That strikes during the War were repressed by various forces is indicated by the rise in their number in 1919, the first post-war year; a startling rise in the number of workers involved to an all-time high of four million indicates that a good many of the strikes of 1919 were industry-wide ones.¹

Congress did not pass a law forbidding strikes, even in defense industries, but the existence of conscription (as we shall see) provided one of the substitutes for such a

¹ A table of the number of strikes in every year from 1881 to 1939 is given in Stein and others, *Labor Problems in America*, pp. 126-27.—C.R.

law. The National War Labor Board, set up in 1918, refused to consider workers' grievances till they went back to work; it frowned on all strikes, and in a pinch the administration used a "big stick" to back it up, as in the Bridgeport situation, below. In order to avoid strikes, many government agencies were set up to set wages or handle grievances in various industries.²

After 1918 a second world war was predicted by many, and the War Department laid plans for industrial mobilization, if that war should come. In 1936 the Senate committee to investigate the munitions industry attempted a prediction of the place of labor and the place of collective bargaining in that mobilization. After the national defense program began in 1940 many bills to regulate strikes or ban the closed shop in defense industries were laid before Congress.

² See, for instance, Gordon S. Watkins, *Labor Problems and Labor Administration in the United States During the World War* (2 vols., Urbana: University of Illinois, 1919); Alexander Bing, *War-time Strikes and Their Adjustment* (New York: E. P. Dutton and Company, 1921). The war experience of the railroads and the boards of adjustment inaugurated at that time are mentioned in an earlier section of this chapter.—C.R.

REPORT OF WAR LABOR CONFERENCE BOARD

WASHINGTON, D. C., March 29, 1918.
HON. WILLIAM B. WILSON,
Secretary of Labor.

SIR: The commission of representatives of employers and workers, selected in accord with the suggestion of your letter of January 28, 1918, to aid in the formulation, in the present emergency, of a national labor program, present to you, as a result of their conferences, the following:

(a) That there be created, for the period of the war, a national war labor board of the same number and to be selected in the same manner and by the

same agencies as the commission making this recommendation.

(b) That the functions and powers of the national board shall be as follows:

1. To bring about a settlement, by mediation and conciliation, of every controversy arising between employers and workers in the field of production necessary for the effective conduct of the war.
2. To do the same thing in similar controversies in other fields of national activity, delays and obstructions in which may, in the opinion of the national board, affect detrimentally such production.
3. To provide such machinery by direct appointment, or otherwise, for selection of committees or boards to sit in various parts

¹ U. S. Bureau of Labor Statistics, *Bulletin* 287, *National War Labor Board* (Washington: Government Printing Office, 1921), pp. 31-33.—C.R.

of the country where controversies arise, to secure settlement by local mediation and conciliation.

4. To summon the parties to the controversy for hearing and action by the national board in case of failure to secure settlement by local mediation and conciliation.

(c) If the sincere and determined effort of the national board shall fail to bring about a voluntary settlement, and the members of the board shall be unable unanimously to agree upon a decision, then and in that case and only as a last resort, an umpire appointed in the manner provided in the next paragraph shall hear and finally decide the controversy under simple rules of procedure prescribed by the national board.

(d) The members of the national board shall choose the umpire by unanimous vote. Failing such choice, the name of the umpire shall be drawn by lot from a list of 10 suitable and disinterested persons to be nominated for the purpose by the President of the United States.

(e) The national board shall hold its regular meetings in the city of Washington, with power to meet at any other place convenient for the board and the occasion.

(f) The national board may alter its methods and practice in settlement of controversies hereunder, from time to time, as experience may suggest.

(g) The national board shall refuse to take cognizance of a controversy between employer and workers in any field of industrial or other activity where there is by agreement or Federal law a means of settlement which has not been invoked.

(h) The place of each member of the national board unavoidably detained from attending one or more of its sessions may be filled by a substitute to be named by such member as his regular substitute. The substitute shall have the same representative character as his principal.

(i) The national board shall have power to appoint a secretary, and to create such

other clerical organization under it as may be in its judgment necessary for the discharge of its duties.

(j) The national board may apply to the Secretary of Labor for authority to use the machinery of the department in its work of conciliation and mediation.

(k) The action of the national board may be invoked in respect to controversies within its jurisdiction, by the Secretary of Labor or by either side in a controversy or its duly authorized representative. The board, after summary consideration, may refuse further hearing if the case is not of such character or importance to justify it.

(l) In the appointment of committees of its own members to act for the board in general or local matters, and in the creation of local committees, the employers and the workers shall be equally represented.

(m) The representatives of the public in the board shall preside alternately at successive sessions of the board or as agreed upon.

(n) The board in its mediating and conciliatory action, and the umpire in his consideration of a controversy, shall be governed by the following principles:

There should be no strikes or lockouts during the war.

Right to organize.—1. The right of workers to organize in trade-unions and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.

2. The right of employers to organize in associations or groups and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the workers in any manner whatsoever.

3. Employers should not discharge workers for membership in trade-unions, nor for legitimate trade-union activities.

4. The workers, in the exercise of their

right to organize, shall not use coercive measures of any kind to induce persons to join their organizations, nor to induce employers to bargain or deal therewith.

Existing conditions.—1. In establishments where the union shop exists the same shall continue and the union standards as to wages, hours of labor and other conditions of employment shall be maintained.

2. In establishments where union and nonunion men and women now work together, and the employer meets only with employees or representatives engaged in said establishments, the continuance of such condition shall not be deemed a grievance. This declaration, however, is not intended in any manner to deny the right, or discourage the practice of the formation of labor unions, or the joining of the same by the workers in said establishments, as guaranteed in the last paragraph, nor to prevent the War Labor Board from urging, or any umpire from granting, under the machinery herein provided, improvement of their situation in the matter of wages, hours of labor, or other conditions, as shall be found desirable from time to time.

3. Established safeguards and regulations for the protection of the health and safety of workers shall not be relaxed.

Women in industry.—If it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work and must not be allotted tasks disproportionate to their strength.

Hours of labor.—The basic eight-hour day is recognized as applying in all cases in which existing law requires it. In all other cases the question of hours of labor shall be settled with due regard to governmental necessities and the welfare, health, and proper comfort of the workers.

Maximum production.—The maximum production of all war industries should be maintained and methods of

work and operation on the part of employers or workers which operate to delay or limit production, or which have a tendency to artificially increase the cost thereof, should be discouraged.

Mobilization of labor.—For the purpose of mobilizing the labor supply with a view to its rapid and effective distribution, a permanent list of the number of skilled and other workers available in different parts of the Nation shall be kept on file by the Department of Labor, the information to be constantly furnished: 1. By the trade-unions; 2. By State employment bureaus and Federal agencies of like character; 3. By the managers and operators of industrial establishments throughout the country. These agencies should be given opportunity to aid in the distribution of labor, as necessity demands.

Custom of localities.—In fixing wages, hours and conditions of labor regard should always be had to the labor standards, wage scales, and other conditions, prevailing in the localities affected.

The living wage.—1. The right of all workers, including common laborers, to a living wage is hereby declared.

2. In fixing wages, minimum rates of pay shall be established which will insure the subsistence of the worker and his family in health and reasonable comfort.

(Signed)

LOYALL A. OSBORNE.

L. F. LOREE.

W. H. VAN DERVOORT.

C. E. MICHAEL.

B. L. WORDEN.

WM. H. TAFT.

[Employers' Representatives]

FRANK J. HAYES.

WM. L. HUTCHESON.

THOMAS J. SAVAGE.

VICTOR A. OLANDER.

T. A. RICKERT.

FRANK P. WALSH.

[Employees' Representatives]

THE BRIDGEPORT STRIKE

THE WHITE HOUSE,
Washington, 13 September, 1918.

GENTLEMEN: I am in receipt of your resolutions of September 6 announcing that you have begun a strike against your employers in Bridgeport, Conn. You are members of the Bridgeport branches of the International Union of Machinists. As such, and with the approval of the national officers of your union, you signed an agreement to submit the questions as to the terms of your employment to the National War Labor Board and to abide the award which in accordance with the rules of procedure approved by me might be made.

The members of the board were not able to reach a unanimous conclusion on all the issues presented, and, as provided in its constitution, the questions upon which they did not agree were carried before an arbitrator the unanimous choice of the members of the board.

The arbitrator thus chosen has made an award which more than 90 per cent of the workers affected accept. You who constitute less than 10 per cent refuse to abide the award although you are the best paid of the whole body of workers affected, and are, therefore, least entitled to press a further increase of wages because of the high cost of living. But, whatever the merits of the issue, it is closed by the award. Your strike against it is a breach of faith calculated to reflect on the sincerity of national organized labor in proclaiming its acceptance of the principles and machinery of the National War Labor Board.

If such disregard of the solemn adjudication of a tribunal to which both parties submitted their claims be temporized with, agreements become mere scraps of paper. If errors creep into awards, the proper remedy is submission to the award with an application for rehearing to the tribunal. But to strike against the award is disloyalty and dishonor.

The Smith & Wesson Co., of Springfield, Mass., engaged in Government work, has refused to accept the mediation of the National War Labor Board and has flaunted¹ [flouted?] its rules of decision approved by presidential proclamation. With my consent the War Department has taken over the plant and business of the company to secure continuity in production and to prevent industrial disturbance.

It is of the highest importance to secure a compliance with reasonable rules and procedure for the settlement of industrial disputes. Having exercised a drastic remedy with recalcitrant employers, it is my duty to use means equally well adapted to the end with lawless and faithless employees.

Therefore, I desire that you return to work and abide by the award. If you refuse, each of you will be barred from employment in any war industry in the community in which the strike occurs for a period of one year. During that time the United States Employment Service will decline to obtain employment for you in any war industry elsewhere in the United States as well as under the War and Navy Departments, the Shipping Board, the Railroad Administration, and all other Government agencies, and the draft boards will be instructed to reject any claim of exemption based on your alleged usefulness on war production.

Sincerely yours,

WOODROW WILSON.

¹ U. S. Bureau of Labor Statistics, *Bulletin No. 287, National War Labor Board* (Washington: Government Printing Office, 1921), pp. 36-37.—C.R.

DISTRICT LODGE No. 55,
INTERNATIONAL ASSOCIATION OF
MACHINISTS

(and other striking workmen of Bridge-
port, Conn.).

1087 Broad Street, Bridgeport, Conn.

THE WHITE HOUSE.

Washington, September 17, 1918.

My attention has been called to the fact that several thousand machinists and others employed in connection with war industries in Bridgeport, Conn., engaged in a strike to obtain further concessions because they were not satisfied with the decisions rendered by the umpire appointed under the authority conferred upon the National War Labor Board. On

the 13th instant I communicated with the workmen engaged in the strike, demanding that they accept the decision of the arbitrator and return to work, and stated the penalties which would be imposed if they refused to do so. The men at a meeting voted to return to work this morning, but I am informed by their representative that the manufacturers refuse to reinstate their former employees. In view of the fact that the workmen have so promptly complied with my directions, I must insist upon the reinstatement of all these men.

WOODROW WILSON.

REMINGTON ARMS, U. S. M. C. PLANT,
LIBERTY ORDNANCE COMPANY
(and others)
Bridgeport, Conn.

THE POSITION OF LABOR IN WAR

The committee wishes to turn now from the discussion of attempts to limit war profits and inflation in order to consider briefly two special fields of war regulation contemplated by the War Department planning. First, the problem of the position in which labor will find itself in the event of war is just as important as the problems pertaining to industry.

I. ORGANIZATION AND PERSONNEL OF WAR-TIME LABOR CONTROL

The Industrial Mobilization Plan provides for the creation of an "Administration of War Labor" to deal with labor problems. This organization is to be independent of the Labor Department and other peacetime agencies affecting labor. Such functions as the placement of workers in jobs and the conciliation of indus-

trial disputes normally exercised by the peace-time agencies are to be transferred to it. As a reason for this transfer the plan states that—

Several of the more important departments exist to serve particular classes, both in peace and war. It would be unfair to expect them to exercise emergency restrictive control over the people that they were created to serve.

This seems to indicate that in time of war placement and conciliation are to be carried on with less attention to the interests of labor than in peacetime.

The Administrator of War Labor "should be an outstanding industrial leader." He is to be assisted by a deputy nominated by himself who presumably would also be an industrialist. He will be assisted in the control of labor by the labor division of the War Industries Administration. This body is composed primarily of men chosen by the industrialists heading the general control agencies or the military departments. There is no provision for a single direct representative of

¹ U. S. Senate, Special Committee on Investigation of the Munitions Industry, *Report on War Department Bills S. 1716—S. 1722 Relating to Industrial Mobilization in Wartime*, Senate Report No. 944, Part 4, 74th Congress, 2d Session (Washington: Government Printing Office, 1936), pp. 47-53.—C.R.

labor, either organized or unorganized, on it.

This agency is to deal with some of the most important differences of interest of modern times and is to have powers vitally affecting the well-being of millions of working people. Yet, as planned, it is completely dominated by one party in the case—the employer side. It is not planned to offset this by representation of the labor side in positions of authority or even to include neutral individuals representing the public. Such an organization may be very antagonistic to aims with which labor is concerned. For example, of the five representatives of employers on the National War Labor Board of the World War, only one had ever dealt with labor unions in his business.

The only representation for labor provided in the plan is in connection with an advisory council for the labor administrator. This is to be composed of five representatives for industry and the same number for labor. Final authority rests with the "prominent industrialist" who is to be the administrator rather than with the advisory board. And there is a strong possibility that whatever influence the board may have will be nullified. The matters with which it will be concerned, such as collective bargaining, labor disputes, wages rates and hours, are extremely controversial. Experience under the N. R. A. shows that settlement of such problems may in some cases require a year. In war such delay would be impossible. So if the advisory board should deadlock the administrator would have to settle such issues himself. Colonel Harris testified on this point as follows:

Senator CLARK. In other words, Colonel, is there not the strongest kind of probability that while this 50-50 council is considering these very much controverted questions, that the Administrator of Labor will have already decided them, and the head of this department, this prominent industrialist, as was stated a while ago, will already have put them into operation?

Lieutenant Colonel HARRIS. The Administra-

tor will undoubtedly, if he finds it is holding up.

2. REGULATION OF LABOR ACTIVITY

As has been pointed out, the Industrial Mobilization Plan provides for a general draft law. Under this law every male person in the country over 18 must be registered with the draft authorities. All able-bodied male citizens between the ages of 18 and 45 are made members of an "unorganized militia" and as such are liable to military service. What particular individuals in this militia are to be drafted into the armed forces depends largely on the system of "deferments." Local draft boards will classify men as those available for immediate draft and those whose induction into the armed forces is deferred for one reason or another. The War Department has stated that "a deferment once made is not final . . . and any man can be reclassified and called when circumstances require."

This system gives the war-time authorities a powerful influence on the activities of private individuals, particularly workers. Under the principle of "work or fight," which was invoked during the final months of the last war, they can largely determine where men whose draft has been deferred are to work. Mr. Baruch has described the work-or-fight order as saying to these men:

No matter what the grounds for your deferment may be, unless you are faithfully, continuously, and usefully employed in a capacity and for an enterprise determined by the Government to be essential to the prosecution of the war, your deferment will be canceled and you will immediately be called for service with the colors.

He has said that the Government—

can go much further. It can say that if a man be called and found unfit for military service but fit for other work in the essential lists (of industries), he must so employ himself or be cut off from rations, transportation, fuel, and supplies.

He favors the use of this principle in the next war and states that it "is capable of immense expansion."

The committee believes that if the work-or-fight principle is authorized by law, along with a draft act such as the War Department contemplates, then this country will have for all practical purposes a draft of labor. The military and industrial authorities are interested in two things in connection with labor—an adequate supply of workers in the jobs where they are needed and continuity of employment with no stoppage of work. Under the above set-up they can achieve these aims. They cannot perhaps order every individual to work at a particular job picked out for him specifically but they can order him not to work in certain industries and they can specify certain industries in which available men must be employed if they want to stay out of the Army. If they refuse to allow men to remain idle at all, as they would have a right to do, then workers would have to accept the particular jobs indicated to them by the Government, since even in war, it requires some time for a man who has just lost one job to find another without assistance. Furthermore, the Government authorities could break any strike simply by canceling the deferments of the strike leaders and as many of their men as necessary and drafting them into the Army. . . .

There are two primary ways in which the naturally weak position of labor as compared with that of employers may be strengthened. One is Government legislation, such as the Adamson 8-hour-day law for railroad workers or the wage and hour provisions of the N. R. A. codes. It was the opinion of a group of student officers delegated at the Army Industrial College to study the war plans in the light of the changes brought about by the N. R. A., that while in general planning had been facilitated by N. R. A., "undoubtedly such provisions of emergency codes as apply to

maximum hours of labor and minimum wages would have to be scrapped." There may be a strong movement to eliminate legislative provisions favorable to labor in the next war.

Labor's second means of improving its position is through labor organizations and collective bargaining. Undoubtedly labor unions gain in a war period. The American Federation of Labor increased its membership considerably in 1917 and 1918. It should be noted, however, that the greatest increase came after the war and that much of the war and post-war gain was only temporary. Moreover, there are certain considerations which prevent labor from taking full advantage of war opportunities and which curtail the protection which unions might give.

The necessity for increased production may bring the Government into conflict with organized labor. The Industrial Mobilization Plan provides that the War Labor Administration shall consider the question of—

Maintenance of maximum production in all war work, and the suspension for period of the actual emergency and a reasonable adjustment thereafter of all restrictive regulations not having the force of law which unreasonably limit production.

This might include the abrogation of union contracts pertaining to wages, hours, and conditions of work. In an effort to hurry production the War Department undertook in the last war to allow contractors for cantonments to hire non-union labor. This stand was modified following a protest from the American Federation of Labor.

Labor organization by itself does not guarantee the worker his rights in a war-time situation. Much depends on what use is made of the organization. In war, labor unions may not be as militant in seeking to gain their ends as they are in peace. Labor leaders are particularly subject to the patriotic pressure of war time. Samuel Gompers, president of the American Fed-

eration of Labor during the World War, in the spring of 1917 called a conference of both labor and industrial leaders which reached an agreement that "neither employers nor employees shall endeavor to take advantage of the country's necessities to change existing standards." As a result the Washington labor leaders ceased to push organizing campaigns as vigorously as they might otherwise have done, according to some who also hold that if it had not been for the activities of the rank and file, the situation in industrial relations might have become frozen and labor would have gained much less from the war. The officers of the Federation "put aside their roles of organizers and strike leaders to become conciliators and mediators."

This question of patriotic pressure has an important bearing on the use of labor's most fundamental means of gaining its demands—the strike. A strike by labor cannot be secret like those strikes by industry discussed above. It will be open and subject to public scrutiny. This fact is bound to reduce the readiness of labor leaders to resort to strikes in war.

Even if labor does feel it necessary to resort to strikes, there is no guarantee that it will be free to do so. In Great Britain the right to strike was abridged by law. In this country one of the principles adopted by the Labor Conference Board was that "there should be no strikes or lockouts during the war." The War Department has said that problems—

that arise from differences between employers and employees . . . can be minimized by foreseeing and wherever possible *forestalling such disputes*. . . .

If a strike should break out, ways of dealing with it are available to the Govern-

ment authorities. It has been pointed out that the deferment system of the general draft act, either with or without a work or fight bill, constitutes a tremendously effective strike-breaking weapon. It is also possible for the military authorities to take soldiers in uniform, order them to work for private employers, and break a strike in this fashion. According to the minority report of the Graham Committee, soldiers were set to work in this manner in the lumber mills of the Pacific Northwest during the last war with the knowledge of Mr. Gompers and the Secretary of War. Mr. Howard Coffin testified regarding this incident before the War Policies Commission as follows:

Mr. COLLINS. Now you spoke about labor. What do you think about the Government drafting about twice as many men as it needs and then taking those that it does not need for strictly fighting purposes and using them as labor?

Mr. COFFIN. Entirely impractical, except in some specialized instances, as, for instance, our timber situation in the Northwest. That was a situation that, late in 1917, had to be met in just that way, and it probably was the wisest way to meet it.

Mr. COLLINS. You believe that in certain circumstances?

Mr. COFFIN. Where a condition of alien activity existed which could not be overcome in any other way.

The attitude of military men may be hostile to strikes even in peace. According to testimony before the committee, a Captain Williams of the Navy was sent up to Camden in connection with a strike then in progress at the plant of the New York Shipbuilding Corporation. He was reported to have "intimated very strongly" to labor officials that unless the strikers returned to work upon the company's terms, the Navy would remove an unfinished cruiser from the yard.

THE PROBLEM OF STRIKES IN DEFENSE INDUSTRIES

The war labor problem of 1917-18 reappeared when the European war crisis of

1940 caused the President and Congress to undertake a re-armament program. The

chief problem was one of preventing strikes and to do it without setting up a restrictive system which might come to be abused and without suppressing labor's legitimate claims. A number of bills were introduced in Congress to limit union actions. There was some talk of compulsory arbitration; one Congressman proposed the death penalty for defense strikers. The most popular proposal borrowed the thirty-day "cooling off" period from the Railway Labor Act. Strictly speaking, this method involved no more than a greater opportunity for confidential mediation. But it was sometimes proposed also to borrow from the railway act the method of the emergency board of investigation, with public opinion operating to enforce the published award.

Practices which came in for special criticism and for proposed Congressional action were jurisdictional strikes and the closed shop. Some jurisdictional strikes were A. F. L.-C. I. O. clashes and others were disputes between A. F. L. building-trades unions. One aspect of the closed shop was especially publicized—the relatively high initiation fees charged by some unions which had succeeded in getting closed-shop agreements on work related to defense preparations. Many union leaders were anxious to show that labor could keep strikes to a minimum without governmental regulation and in March, 1941, the building-trades department of the A. F. L. voted to bar defense strikes arising out of jurisdictional disputes between unions in the department. It also voted that when they were unable to supply a full force of men for a defense project and the contractor was one fair to organized labor, they would raise no objection to his hiring non-union men until they could find union members to do the work; they would not collect any fees for work permits from the non-union men nor collect any initiation fees except for regular membership; initiation fees would be kept at a reasonable figure and could be paid in installments.

Similarly, in relation to the broad question of avoiding work-stoppages, the members of the Labor Policy Advisory Committee of the National Defense Advisory Council, some from the A. F. L., some from the C. I. O., and some from railroad unions, in December, 1940, stated on behalf of organized labor

that it pledged itself to build American means to fight dictatorship and therefore pledged itself to invoke government conciliation in an attempt to avoid suspensions of operation. The International Association of Machinists of the A. F. L. later announced that it would submit all disputes to federal conciliation. If they were not settled then, it would submit them to the O. P. M., and, if they were not settled then, to arbitration.

Early 1941 was marked by a considerable number of strikes in defense industries, which were given much publicity. Organized labor's position was that most of them would not have occurred if employers accepted the institution of collective bargaining. Public opinion, however, was aroused against strikes and unions. A Gallup poll in March, 1941, showed 85 per cent of the public favoring the proposal that defense labor disputes be submitted to a federal board before a strike could be called; 72 per cent favored the proposal that defense strikes be forbidden. Among the groups favoring the idea of using voluntary methods of settlement if possible was a committee of the Chamber of Commerce of the United States appointed to formulate policy on defense strikes. Its report¹ is quoted from here.

PROPOSED REMEDIES

During the closing days of the 76th Congress the occurrence of labor disputes in several defense plants prompted the introduction of measures designed to afford relief from this condition. . . . One meas-

¹ *Adjustment of Labor Disputes in Defense Industries*, Committee Report, January 24, 1941 (Washington: Chamber of Commerce of the United States, 1941), pp. 4-7. Issued for the information of members and possible later action by the Chamber. Cf. a statement in favor of "cooling off," but proposing at least temporary reliance on voluntary adherence to that method, put out by the "Ives committee." State of New York, *Report of the New York State Joint Legislative Committee on Industrial and Labor Conditions*, Legislative Document No. 51 (Albany: Fort Orange Press, 1941), p. 32. The committee also proposed that, in serious disputes, special boards of investigation be appointed to propose terms of settlement and, if necessary, to invoke public opinion by publishing its proposal. As we have seen, this proposal was enacted into law in New York in March, 1941.—C.R.

ure would prohibit strikes at defense production plants; others would set up facilities for the conciliation and arbitration of disputes at such plants. In addition, it was proposed that injury to or destruction of property used in performance of a defense contract or interference with defense work, if with intent to obstruct the national defense, be made a criminal act, with severe penalty.

Strike prevention. As a means of preventing strikes by industrial defense workers, whether employed by the government or in private plants, all persons working on products for the national defense would be required to enter into individual contracts fixing hours, wages, and duration of employment. Violation of such contracts would thereafter be unlawful; and advocating, promoting, or carrying on strikes at plants where employment contracts were in effect would likewise be unlawful for the period of the emergency. Any employee would be permitted to cease work, but by so doing he would lose his status as an employee.

Conciliation and arbitration. Proposals for special facilities in the fields of conciliation and arbitration would exert a restrictive influence temporarily by prohibiting strikes and lockouts before the expiration of a specified waiting period.

One measure, providing for the creation of a defense industry labor conciliation service in the Department of Labor, would require advance notice from employer or employees in a defense plant who desired to change existing employment relations, and would impose on the parties the duty of attempting in good faith to reach an agreement within 20 days. If no agreement were reached, either party might give notice to the other and to the federal conciliator of an intention to strike or lockout, to be effective in not less than 30 days. Stoppage or slow-down of work during this period would be unlawful.

Within the 30-day period the federal conciliator would endeavor to effect a settlement of the dispute or, with the consent of the parties, appoint arbitrators to hear and determine the issues.

In addition to the requirement for a "waiting period" in advance of a strike or lockout at a defense plant and resort to mediation and arbitration, another measure calls for a formal report to the President whenever a dispute cannot be amicably adjusted. The report would outline the grievances and the efforts of each party to reach an agreement, and indicate which party refused to arbitrate. When a strike, a lockout, or other change was made concerning the matter in dispute, the President would publicize the fact that the party in question had deliberately jeopardized the national defense by wilfully disregarding the public policy of adjusting amicably and expeditiously labor disputes affecting the national defense.

STATE LAWS

Approximately 40 states have enacted legislation on the subject of conciliation and arbitration of industrial disputes. In general, such legislation provides that, upon threat or occurrence of a serious labor disturbance, the agency created for this purpose intervenes and attempts to bring the parties together in an effort to reach a satisfactory solution. If attempts at conciliation prove ineffective, the parties are urged to resort to arbitration as provided in the statute. In a few cases, the state statute prohibits changes in the employment relations during the period of investigation and imposes penalties for violation.

CONCLUSIONS

With full recognition of the importance of preventing interruptions in the defense program, we nevertheless have grave doubts as to the wisdom of urging federal legislation for this purpose, to apply to all industries participating in this program.

Of necessity, such legislation, although ostensibly designed to provide a basis for maintaining peace in industry, will have as its main objective the development of a national labor policy for the emergency period. Accordingly, it not only will deal with unusual and emergency conditions but it must also be prepared and advanced under circumstances that preclude the full use of the deliberative process so essential to sound legislative procedure.

Nor are we convinced that there is present need for additional federal legislation in the field of industrial relations. In particular, we refer to legislation of the "anti-strike" variety. Despite the occurrence of isolated instances of labor disagreements which appear to have received undue prominence in the press, there is every evidence of an increasing determination on the part of both management and workers to develop voluntary methods for the adjustment of labor difficulties and thus to prevent production stoppage. According to recent estimate, such voluntary methods will probably prove effective in 99% of the defense industries.

In holding to this opinion we subscribe to the views expressed by the Judiciary Committee of the House of Representatives of the 76th Congress, following consideration of several measures designed to provide settlement of labor disputes in defense industries. After contacting interested agencies of the government and other advised sources, the Committee expressed the belief that "no recommendations at this time as to additional legislation would be in harmony with the public interest." The Committee added it felt justified in the expectation "that there will be complete harmony among the agencies of government and of labor and capital and the people in keeping the machinery producing war materials in operation at capacity." We are aware of no subsequent changes in conditions that would qualify the value or the soundness of these conclusions.

Normal dictates of patriotism on the part of our citizens, employers and employees alike, supplemented by the force of a steadily increasing public opinion against unnecessary interruptions to the defense program, are already exerting a strong influence in favor of voluntary settlement of labor grievances. Loss of man-hours due to strikes in 1940 was approximately one-half of the 1939 figure. While it can scarcely be asserted that this is solely due to improved methods adopted by employers and employees for handling labor relations problems, it is entirely conceivable that the imposition of further legislative restrictions may result in a definite reversal of the present trend.

To the extent that the assistance of the federal government is required to supplement the voluntary efforts of management and workers to adjust their differences, we are convinced that such assistance should be provided through the facilities of the United States Conciliation Service. Over a period of many years this agency, with no actual authority and with a limited staff, has achieved noteworthy success in the adjustment of labor disputes.

The strong support given to this work by labor organizations as well as by employers testifies to the fair and impartial manner in which the United States Conciliation Service has continued to operate. In view of the extent to which both employers and employees are now cooperating with the Conciliation Service, we are confident that this agency, aided when appropriate by similar agencies created within the states, will prove adequate ensure a minimum of interruption in the defense program through labor disputes.

RECOMMENDATION

In furtherance of the conclusions above noted, we submit the following statement as our suggestion for basic Chamber policy on this subject:

Public policy is opposed to interference with defense.

The inter-relation of businesses makes it next to impossible to draw a line between defense and non-defense industries.

The National Chamber believes that anti-strike laws will prove ineffective and that they will deny fundamental rights to our citizens. The Chamber further believes that public interest will be best served by voluntary co-operation.

To this end the Chamber enlists the support of its member organizations in urging all employers to develop plans with their employees designed to promote the amicable and prompt adjustment of labor disputes which may arise; and, should these internal plans fail, recommends that existing conciliatory services now available be enlisted and used to facilitate prompt settlement of such disputes.

On February 28, 1941, William S. Knudsen of the O. P. M. proposed that, when the Conciliation Service was unable to settle a defense dispute, a strike might be scheduled only after, in a secret ballot held by the Department of Labor, at least 60 per cent of all employees concerned voted in favor of striking. If the vote favored a strike, it should not be allowed to take place until the O. P. M. had had ten days to investigate and report and until 30 more days had elapsed for the consideration of the O. P. M. report. In March a committee of the National Association of Manufacturers proposed that jurisdictional strikes should be forbidden in defense industries; that there should be a 40-day mediation period before strike-calls became effective; that a majority of employees had to vote in favor of the strike; and that an impartial federal conciliation board be appointed to supplement the existing Conciliation Service. The penalties were to be: an employer violating these rules would be said to have engaged in an unfair labor practice under the National Labor Relations Act (see Chapter 5); employees

violating them would be denied their right to seek redress against employers under that act and would lose their draft deferment; in addition, the federal government would be authorized to go to the courts "to prevent or terminate any strike or lock out" called in violation of these rules.

In March, 1941, the President appointed a National Defense Mediation Board made up of three public members and four members from unions and four from among employers, under the chairmanship of Clarence Dykstra. It had no legal power of enforcing its decisions, nor any power of subpoena. It had only the power of persuasion and of submitting its decisions for the approval of public opinion. The President's decree referred to the fact that he had declared a state of emergency on September 8, 1939. It declared that it was essential that both parties in defense industries exert every effort to avoid interruptions of output. The regular Conciliation Service was to try to handle disputes, but if it could not, the Secretary of Labor might call in the new board (except in disputes covered by the Railway Labor Act).

The Board was to try to settle the dispute; to suggest arbitration; to appoint arbitrators when asked to by both sides; to help set up machinery for the resolution of future disputes; to investigate the issues in the dispute and, if it thought it wise, to make them public; and, if it thought wise, to ask the National Labor Relations Board to expedite the holding of a collective-bargaining election.

The Board was to assign to any dispute a division of not less than three members.

Employers and unions were asked to notify the Conciliation Service and the O. P. M. of changes in terms of work which they wanted to bring about, of the development of any dispute, and of any threatened interruption of production.

CHAPTER FIVE

THE NATIONAL LABOR RELATIONS ACT

The chief governmental instrument which aids trade unions and fosters collective bargaining between them and employers is the National Labor Relations Board (N. L. R. B.), which administers the National Labor Relations Act (N. L. R. A.), often called the Wagner Act. We have already seen that there is a board which functions in a similar way in an essential industry, the railroad industry. And, incidentally to our study of governmental aid to employing companies in the previous four chapters, we have already noted a number of governmental aids to unionists outside the railroad industry, some of them aids given by the N. L. R. B. Thus we dealt with three situations in which unionists sought reinstatement in their jobs, under the N. L. R. A., but failed to get it (the *Sands*, the *Columbian*, and the *Peninsular* cases). We noticed that a union can sometimes restrain a company from breaking a contract; and that weak unions welcome the intervention of mediators, who may be able to break the ice that is keeping negotiations from getting under way. We have seen that, in the acts creating the railroad board and in its predecessors, Congress' attempts to promote mediation and arbitration have been tied up on several occasions with attempts to forbid discrimination against unionists, analogous to the attempt to forbid it which Congress made in the N. L. R. A. The *Red River* and *Ford* cases, quoted from in an earlier chapter, have shown that the N. L. R. A. may perhaps be interpreted to penalize companies which cause excesses in the policing of labor disputes—a union “defense” against such excesses which is in addition to the unions’ normal attempts to tone down these excesses.¹

The chief positive aids which unionists

hope to get from governmental agencies in order to gain advantage in the collective-bargaining process have, then, been sampled already. They are protection against intimidation by company agents, protection against discharge for union activity, and recognition plus a seat at a conference table. If these protections are given, another advantage to the union results: its members and prospective members realize that the corporation cannot have everything its own way—that the system can be bucked.

As we have said, the chief instrument for giving such positive aids to unions is the National Labor Relations Act, and the discussion of those aids will center around the interpretation of that law. Its main functions are the ones just listed: protection against dis-

perhaps appeal, either to a higher court (on general principles, or under the Constitution) or to the legislature, asking it to declare that the law is to *leave them free* instead of hindering their actions. For instance, in *C. I. O. v. Hague*, quoted in an earlier chapter, the courts forbade the enforcement of ordinances which limited unionists’ freedom of communication and also forbade the lawless action of the police in deporting organizers from Jersey City. In these cases one government agency overrode and restrained another. Where a higher court overrides a lower, the action is similar, but it is also possible to think of the various courts as making up one agency, the judiciary. Not dissimilar to the appeal to a higher court is the action of a union in going to a police chief to ask him to instruct his men to be less severe, or to a governor to ask him to change the methods of the militia in a labor dispute.

When the union’s protest action takes the form of bringing criminal charges against police excesses, or making a complaint to the N. L. R. B. about them, or seeking a law to punish private police who operate outside the employer’s premises, the legal nature of the protest is a little different. The union is seeking governmental aid—is trying to impose legal duty on opponents. Though there is no clear line between this sort of protest and unions’ efforts to get rid of legal duties, mentioned in the previous paragraph, yet in general this book treats the latter sort in this chapter and the former sort in the previous chapters.

Cf. Stein and others, *Labor Problems in America*, pp. 551–52.—C.R.

¹ The previous four chapters are, of course, filled with situations in which unionists against whom legal action (including police action) is brought try to tone it down or get rid of it altogether. They will

charge, recognition for majority unions, to a small extent protection against violence, and an assurance that building up a union is not a hopeless struggle. The N. L. R. B. interprets and administers the act. Thus, if a company interferes with its employees' freely organizing into a union or unions, the Board is expected to order the company to cease and desist. If a company refuses to recognize a union, the Board is expected to order that the company leaders meet with the union leaders and make an effort to reach an agreement with them. If the company does not admit that the union has the support of a majority of the employees, the Board will hold an election. If the union wins the election, this fact is naturally a considerable boost to its prestige, and this boost is more important than the fact that the Board can now order

the company to meet with the union. The act tolerates the closed shop only if the union arranging for it has been shown to be a majority union.

The Board is subject to some correction by the courts. In fact, it cannot bring legal pressure to bear on a company until it has submitted the case to a federal circuit court of appeals. It has power to take action only against employers, though its order, of course affect unions. A Board order against a firm may indirectly amount to an order against a labor organization if it is one which is dominated or favored by the firm. Critics of the act often ask that Congress forbid various union activities and give the Board power to punish them. Several state labor-relations laws do put restraints on both employers and unions (see pp. 272-73).

I. STATUTES FORBIDDING UNFAIR LABOR PRACTICES

The functions performed by the N. L. R. B. were not invented in 1935. In the 1890's, when labor unions were still small, it was widely felt that for an employer to discriminate against union members and to blacklist them with other employers was unjust. A good many state laws were passed to check these practices.¹ Though the blacklist is generally conceded to be illegal even when no statute has been passed against it, in practice it is impossible to get evidence of its existence. It is only one degree less difficult to get evidence of discrimination; moreover the early laws against discrimination were declared unconstitutional, as we saw in the special case of the railroads (*Adair v. U. S.*, in Chapter 4).

The war of 1917-18 brought a pronouncement from the National War Labor Board, as we have seen, that employers were not to discriminate against union men. But this Board was not continued after the war and "yellow-dog contracts" multiplied to fight the rise of unions in the post-war boom. These "contracts" let the employees know that joining a union would be penalized. After the *Hitchman* decision of 1917 (quoted in an

earlier chapter), companies counted on being able to keep out union organizers by means of injunctions based on these "contracts"; but these injunctions were not widely used and were legislated out of existence, as we saw. The long business decline of 1930-33 led to the National Industrial Recovery Act (the N. R. A. law) which included a concession to labor—Section 7(a); this in turn led to Public Resolution 44, the revised Railroad Labor Act (quoted earlier), and the N. L. R. A., which superseded 7(a) and 44. After noting what is in the statutes, we shall turn to the interpretation and administration of the N. L. R. A. The administration of 7(a) and 44 was similar; it was carried on by the National Labor Board of 1933-34 and the old National Labor Relations Board of 1934-35, whose work was well described in Lewis Lorwin and Arthur Wubnig, *Labor Relations Boards*.² Their interpretation of the vague Section 7(a), based on collective bargaining customs, the work of the War Labor Board of 1918, etc., became the basis for drawing up a more explicit charter—the N. L. R. A.

¹ See list in Commons and Andrews, *Principles of Labor Legislation* (New York: Harper and Brothers, 1936, rev. ed.), pp. 405-7, notes 111, 116, and 117.—C.R.

² Washington: The Brookings Institution, 1935. Or see a condensation of this material in Leverett S. Lyon and others, *The National Recovery Administration* (Washington: The Brookings Institution, 1935), chapters 16-19.—C.R.

THE N. R. A.'s SECTION 7(a)

48 Stat. 195, 198; 15 U. S. C. §707.

SEC. 7. (a) Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organi-

zation or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing. . . . [From the National Industrial Recovery Act, approved June 16, 1933.]

PUBLIC RESOLUTION NO. 44

48 Stat. 1183; 15 U. S. C. §§702a-702f.

After some months as chairman of the National Labor Board, Senator Wagner drew up a Labor Disputes bill in 1934. This bill was aimed to give the Board teeth.¹ Instead of passing it, Congress adopted the stop-gap Public Resolution 44. However, it also passed, under pressure of the railroad labor lobby, the revision of the Railroad Labor Act.

* * * *

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to further effectuate the policy of title I of the National Industrial Recovery Act, and in the exercise of the powers therein and herein conferred, the President is authorized to establish a board or boards authorized and directed to investigate issues, facts, practices, or activities of employers or employees in any controversies arising under section 7a of said Act or which are burdening or obstructing, or threatening to burden or obstruct, the free flow of interstate commerce, the salaries, compensation and expenses of the board or boards and necessary employees being paid as provided in section 2 of the National Industrial Recovery Act.

SEC. 2. Any board so established is hereby empowered, when it shall appear in the public interest, to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in section 7a of said Act and now incorporated herein.

For the purposes of such election such a board shall have the authority to order the production of such pertinent documents or the appearance of such witnesses to give testimony under oath, as it may deem necessary to carry out the provisions of this resolution. Any order issued by such a board under the authority of this section may, upon application of such board or upon petition of the person or persons to whom such order is directed, be enforced or reviewed, as the case may be, in the same manner, so far as applicable, as is provided in the case of an order of the Federal Trade Commission under the Federal Trade Commission Act.

¹ See Lorwin and Wubnig, *op. cit.*, chapter 9.

SEC. 3. Any such board, with the ap-

proval of the President, may prescribe such rules and regulations as it deems necessary to carry out the provisions of this resolution with reference to the investigations authorized in section 1, and to assure freedom from coercion in respect to all elections.

SEC. 4. Any person who shall knowingly violate any rule or regulation authorized under section 3 of this resolution or impede or interfere with any member or agent of any board established under this resolution in the performance of his duties, shall be punishable by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both.

SEC. 5. This resolution shall cease to

be in effect, and any board or boards established hereunder shall cease to exist, on June 16, 1935, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 of the National Industrial Recovery Act has ended.

SEC. 6. Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or engage in other concerted activities.

Approved, June 19, 1934.²

² The decision in the *Houde* case, reproduced below, was handed down by the old National Labor Relations Board, which was set up under this resolution.—C.R.

THE NATIONAL LABOR RELATIONS ACT

49 Stat. 449; 29 U. S. C. §§151-66.

After some months as chairman of the National Labor Board, Senator Wagner redrafted and re-introduced his Labor Disputes bill in 1935, and, soon after the N. R. A. was declared unconstitutional in May 1935, Congress passed his revised bill as the National Labor Relations Act.

An Act to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SEC. 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the in-

strumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection

by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise,

and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse. . . .

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. . . .

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as the chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collec-

tively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership herein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargain unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives. . . .

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such per-

son to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . .

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported

by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a tran-

script of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board. . . .

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation. . . .

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike. . . .

Approved, July 5, 1935.

II. THE CONSTITUTIONALITY OF THE N. L. R. A.

Employers almost all condemned the N. L. R. A. when it was passed and a legal drive was begun to have it declared unconstitutional. The Liberty League's committee of eminent lawyers marshalled impressive precedents against it. The new Board set up by the act began hearings on new cases, but it was kept from proceeding with many of

them by injunctions which companies secured from federal district courts.

After a year and a half the Railway Labor Act and the N. L. R. A. reached the Supreme Court. The case against them before the Court is illustrated by the following oral argument in the *Associated Press* case, by a former Democratic candidate for President.

THE ASSOCIATED PRESS *v.* NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States. 1937.

Oral Argument ¹

WASHINGTON, D. C.,

Tuesday, February 9, 1937.

The above-entitled matter came on for oral argument before the Chief Justice and Associate Justices of the Supreme Court of the United States, at 2:55 P. M.

Appearances:

On behalf of the petitioner: Mr. John W. Davis, Mr. William C. Cannon, Mr. Harold W. Bissell, Mr. Edwin F. Blair.

On behalf of the respondent: Hon. Stanley Reed, Solicitor General of the United States; Mr. Charles E. Wyzanski, Jr., special assistant to the Attorney General; Mr. Charles Fahy, general counsel, National Labor Relations Board.

The CHIEF JUSTICE. No. 365, the Associated Press against the National Labor Relations Board.

MR. ERNST. If the Court please, I am the attorney for the American Newspaper Guild. We have filed briefs as *amicus curiae*. My client is the real party at interest, sole beneficiary. . . .

MR. DAVIS. If the Court please, this case is here on certiorari to the United States Circuit Court of Appeals for the Second Circuit. The only question involved, so

far as we know and believe, is the constitutionality of the National Labor Relations Act of July 5, 1935.

The history of the case lies in short compass. On the 18th day of October 1935 the Associated Press discharged one Morris Watson, who was one of its editorial employees in its New York office. As such an editorial employee, his duties consisted in reporting the news when he was sent out for that purpose, and writing the news, and rewriting the news which came in from other reporters to the New York office of the Associated Press from those with whom it had an exchange of news, in selecting the news which was to be transmitted to the members of the Associated Press for publication by them, and on occasion in "killing" the news when it was received, as being of no substantial value, every editor having on his desk a lethal instrument known as a "kill hook" on which would be deposited, in mortuary fashion, any news which, according to his judgment, did not possess sufficient public interest to form a part of the news dispatched to any section of the country.

He was discharged. He had been in the employ of the Associated Press for 7 years, first as a reporter in their Chicago office, and then in the New York office as a reporter and an inside editor. According to his own statement, he preferred repor-

¹ *Arguments in the Cases Arising under the Railway Labor Act and the National Labor Relations Act before the Supreme Court of the United States, February 8-11, 1937, Senate Document No. 52, 75th Congress, 1st Session (Washington: Government Printing Office, 1937), pp. 53-70.—C.R.*

torial duties, because they better suited his active and energetic temperament, and he showed himself quite reluctant to be tied down to an editorial desk, but his duties were of both characters.

He had been since 1933 an active member of the American Newspaper Guild, which is a labor organization composed of editorial and reportorial servants in the newspaper world. In fact, he had been one of the organizers of the unit of the guild in the office of the Associated Press and notoriously active in its enterprises. In the good days of the N. R. A. he appeared repeatedly before the code authorities at Washington in its behalf and urged, both before them and in the public prints, a compulsory code for the Associated Press, his employer.

His discharge coincided with the receipt of a demand from the American Newspaper Guild for collective bargaining. Demand was served upon the general manager of the Associated Press in behalf of the American Newspaper Guild, demanding the right to be recognized for purposes of collective bargaining with reference to its editorial employees.

When he was discharged, according to Watson's own statement, the terms of his discharge from his immediate superior, Kendrick, who was the editorial supervisor, were "because we are dissatisfied with your work, you are dissatisfied with us, and I am convinced you will be happier elsewhere."

When the testimony was taken before the examiner who was appointed by the Board, as I shall state in a moment, files of the Associated Press were read by the regional director of the National Labor Relations Board, who reported the file with reference to this particular employee contained a recommendation for his discharge by his superior, Kendrick, upon five different grounds, and his discharge was authorized by his ultimate superior, the general manager of the Associated Press, Mr. Cooper, in writing, endorsed

upon that recommendation in this language: "But solely on grounds of his work not being on a basis for which he had shown capability."

The report of the examiner to the Board called attention to the fact that in that sentence the words "but" and "solely" were underscored, by way of emphasis, by the general manager of the Associated Press.

On the 7th day of November next following his discharge the American Newspaper Guild filed charges with the National Labor Relations Board asserting that his discharge was in violation of rights conferred upon him by the National Labor Relations Act; that it was an attempt to interfere with, influence, and coerce him in his rights to organization and collective bargaining; and that it constituted an unfair labor practice under sub-sections 1 and 3 of section 8 of the act.

Complaint was served upon the Associated Press, and it answered in writing denying that the discharge of Watson was for the reason stated in the complaint, and asserted, upon the same grounds which we shall urge here, that the National Labor Relations Board or its regional division had no jurisdiction or authority in the premises, by reason of the fact that the National Labor Relations Act was obnoxious to the Constitution of the United States.

We asserted that unconstitutionality under the tenth amendment in this answer, on the ground that the act undertook to deal with subject matter not committed to the Congress under the commerce clause of the Constitution; second, that the act was invalid because it violated the fifth amendment, in that it deprived the Associated Press of rights and liberties without due process; and finally, that the act was invalid under the first amendment, in that it was a direct and palpable invasion of the freedom of the press.

The answer and the complaint were then assigned to a trial examiner, and be-

fore that trial examiner we moved to dismiss the entire proceeding upon the same constitutional grounds that were asserted in our answer. The motion was overruled, and the Associated Press thereupon withdrew from the hearing. It did, at the request of the Board and examiner, supply its assistant general manager as a witness, that he might fully state to the examiner and for the purposes of the record the nature and character of the Associated Press, its business, its method of conduct, and the relations which Morris Watson, as one of its editorial employees, sustained to it.

Watson himself was heard. One of his coemployees, who was a member of the American Newspaper Guild, was heard.

Thereupon the examiner reported that in his judgment he had been discharged in order to discourage membership in the American Newspaper Guild; that he had been discriminated against by reason of that membership; that it constituted an interference with his rights under the act; and he recommended that we be required to reinstate him with pay during the period of his absence.

The report went to the Board; and the Board, after consideration, confirmed the report. It entered an order requiring us to cease and desist from discouraging membership in the American Newspaper Guild; from discriminating against any person by reason of that membership; from interfering with, restraining, or coercing any of our employees in the matter of membership or collective bargaining; and affirmatively, to reinstate Morris Watson, with back pay, during the period of his suspension, at the rate of \$295, which he was receiving at the time of his discharge, less any sums he might have earned by his own individual efforts in the meantime.

We declined to comply. Thereupon the Board appealed, as the statute authorizes, to the circuit court of appeals, asking an order directing us to comply with that order of the Board.

The circuit court of appeals, after hearing, affirmed the order of the Board, and granted an order of enforcement, and from that order of enforcement we are here.

Now, before I get to the statute and our specific objections to it, I think I should say something by way of further description of the parties themselves, because much of the argument I propose to make will turn upon the facts in relation to the Associated Press and the facts in relation to the specific duties of the discharged employee, Morris Watson.

Your Honors are already advised of the nature and character of the Associated Press, as a result of other litigation. You know that it is a membership corporation under the laws of the State of New York and that its members are newspapers published throughout the United States, some thirteen hundred or more in number; that for those members the Associated Press collects, compiles, formulates, and distributes intelligence or news, by specific contract between itself and each of its members, under which they are required to accept and pay for the proportionate cost of such news as the Associated Press may send them, and are also required to forward to the Associated Press any news originating in their neighborhood which is of general interest and importance.

The Associated Press has a highly decentralized or broken-down organization, as the report of the Board describes it. There is an eastern division, the office of which is in New York City, the southern division in Atlanta, central division at Chicago, western division at San Francisco, a southwestern division at Kansas City, a bureau in Washington, and foreign services in a great many countries in the world.

It also has exchange arrangements with some of the foreign agencies of the same character: Reuters in England; the Canadian Press, which is organized on much the same line; and the Domei-Tsuchin-

Sha, if my Japanese pronunciation is correct, which is the intelligence agency in the Empire of Japan.

From these sources news is interchanged from office to office and from office to newspaper.

The Associated Press is not a selling organization. By the terms of its charter it is forbidden to make a profit. It is an organization conducted at the cost of its members; and they are required, by a method of computation based upon the populations which they serve, to contribute proportionally to the cost of the enterprise. It serves its members and its members only. It does not operate for itself any instrumentality of interstate commerce or means of communication. It uses the telegraph lines, the telephone lines, the radio to some extent, the mails of course. It has what are called "leased wires," a term which is a colloquialism and not a description of fact. It has service contracts with the telephone and telegraph companies by virtue of which they agree to supply over their wires and with their facilities a certain amount of communication at rates that are fixed.

It is not in any sense, therefore, an agency or an instrumentality of interstate commerce, and, as I shall say later on, it bears no analogy whatever to the railroads, the telephones, or the telegraphs, which are common carriers dedicated by the law of their being and by their own consent to the continued service of the public at large.

The Associated Press, so far as any legal obligation is concerned, could suspend any part or all of its service tomorrow and there could be no objection, except perhaps some contractual obligations with individual members which had not been fully carried out.

It is not a mere conduit of news. The news comes into these divisional offices, as I have said, from one source and another, and goes to the editorial desks, where it is written, rewritten, formulated,

sifted, selected, or suppressed, and in that intermediate process the news which finally emerges may be, in form if not in fact, entirely different from the news which comes in.

That is rapid, it is true. Transit is very rapid in case of such an event as the death of a foreign ruler. A flash from abroad on the death of the King of Great Britain would probably emerge with practically no formulation within the New York office within the space of a very few minutes. Or it might, if the news was not of such nature as to be of an emergency character, go through the process of formulation, depending entirely upon the nature of the event and the character of its report. But some suspension of transit occurs inevitably as it goes through what I describe as the sifting and formulating process of the editorial desk.

The New York office is divided into two distinct divisions. There is, first, the traffic department, and that department looks after the dissemination of the news. It is headed by a so-called "puncher." The "puncher" hands the news to the telegraph operators or the telephone operators for transmission, and then it takes its flight over the wires, over the air, to its ultimate destination.

The other department is the news department, in which these editors and reporters play their part. In the news department they collect, write, rewrite, formulate, select the news that may come in. As the Board's witness, Hippelheuser, described it, he himself being one of the editorial employees, the editorial employees are engaged in production, the others in the dissemination of news and features and photos, and as the Board said in its report touching these editorial employees, the operations of the editors and editorial employees require a high degree of skill, for they must be able to determine the news value of an item and to rewrite copy with speed and the utmost accuracy, and I need hardly repeat to this

Court the boast—and I think the perfectly warranted boast—of the Associated Press, that it aims, above anything else, at impartiality and accuracy in the news it delivers; so much so that I believe it can be said without undue boasting on their part that to the reading public of America the letters "Associated Press" or the symbol "A. P." is a guarantee to the reader that he is receiving uncolored, impartial, and accurate news within the limit of human capability.

Now, I have stated to the Court our constitutional objections to this act, and before I take up the act itself, as I propose to do, paragraph by paragraph, I want to lay to one side certain subjects which, when I state them to the Court, will at once disclose their irrelevance to the questions which we are about to discuss.

This case does not turn in any sense on the subject of collective bargaining, its merits, or its demerits, its wisdom or its unwisdom, its blessings or its injury, its virtue or its vice, or on the right and power of laborers of all character to unionize for common purposes if they see fit. The right to combine for such a lawful purpose has in many years not been denied by any court, said Your Honors in *American Steel Foundries v. Tri-City Trades Council* (257 U. S. 184), and not since the antique doctrine that a combination of men to raise their wages constituted an illegal restraint of trade finally perished from the reports has the right itself, so far as I know, the right per se, the naked right, been denied by any judicial tribunal in this country. It may be abused, no doubt has been abused, but its existence does not derive from any declaration contained in this statute or in any other, because it antedates the statutes and was the subject of judicial recognition long before this act or any similar act was passed.²

² The case cited affirmed that workers were legally free to combine. That affirmation left unsettled the question whether government ought to help

What is involved here is the power of the Federal Government to make collective bargaining compulsory in all the industries of this country. We challenge that power.

This case does not turn, in the second place, on the question whether or not the Associated Press is engaged, as to some of its activities, in interstate commerce. Some of its activities may be conceded to constitute interstate commerce. It is equally clear, as we think, that some of its activities do not constitute interstate commerce, and we think it to be clear that as to its editorial employees their duties are no more interstate commerce than that of a draftsman engaged in drawing plans for a steel mill or the tenders of looms in a textile factory.

And, in the third place, this case does not turn upon the reason or unreason of Watson's discharge. There was nothing about his discharge which could give any right of action under this act. He was an employee at will for no fixed term, and both he and employer had the right at law to terminate that relationship whenever they saw fit, without incurring any financial or other responsibilities.

Nor was it such a relationship as any court of equity could have enforced, for, of course, the doctrine only needs to be stated that a court of equity will not enforce a contract for the performance of personal services.

The case does not turn on whether or not the reasons which his superiors gave for discharging him were true or false, whether when they declared his work not up to the capacity, up to the level for which he had shown capacity, that statement was true or false. I think that now is entirely inconsequential.

them to combine by giving them legally enforceable rights against employers who hampered their combining unduly. Either question (whether men should be free to combine or whether government should help them to combine) can be decided rationally only by a decision on the merits of collective bargaining.—C.R.

Whether the Board was right in holding that was a mere excuse and that there lay behind it some other ingenuous [*sic*] purpose is of no consequence.

I would say this, that I think if Your Honors would take the time to read the testimony of Watson himself before the Board or its examiner and look at the picture he there drew of himself, Your Honors will have no difficulty in concluding that a prudent employer was justified in severing his relationship.

But all that aside—the question here is whether the Federal Government has the power, through its agencies, to compel his reinstatement in this relationship that his employer chose to terminate.

Now such power as there may be is the power that underlies this act, which is asserted, as I heard the learned Solicitor General say, in the analogous case of the Railway Labor Act, to be bottomed solely upon the commerce power.

We assert that it is not a valid exercise of the commerce power, either in general or in its application to the Associated Press. We assert that the act by its scope outruns the commerce power and is an effort to regulate matters that fall far outside of the field, and that that appears by the act from its preamble, from its definitions, from its operative or effective sections, and from its legislative history, and that there shines through the act a clear and studied purpose on the part of Congress to bring all the industries of the country, as far as language can accomplish it, within the reach of the supervision of the National Labor Relations Board. . . .

. . . The decisions of the Labor Board, which are now available in printed form as a public document, demonstrate that the only test the Board has ever applied as to whether any controversy, large or small, affected commerce, was whether the raw materials of the industry, all or part, were drawn from without the State, and whether the finished products, in

whole or in part, were shipped without the State after they were finished.

And wherever the Board has found those circumstances to exist it has declared, as the basis of its jurisdiction, that it had detected a flow of commerce, and as you read the decisions of the Board you can only conclude that the word "flow" is to them the grand, omnific word that disposes of all their doubts and controversies, and wherever they find any prior or any subsequent movement in interstate commerce they describe the result as a "flow," and they proceed to adjudicate.

The discharge of a few girls in the canvas-glove factory in Brooklyn, the refusal of a reconditioner of soiled burlap bags to bargain collectively, the statement by a soap maker in California to one of his men and to men in general that they ought not to "join this damn one-horse union," discharge by a manufacturer of woolen underwear in Richmond of two out of his five cutters—all those things and many more are held by the Board to have affected the flow of commerce. . . .

The circuit court of appeals, deceived by this analogy, said it was an interstate system devoted to interstate communication. Admit all of that, and as I see it, it does not advance the argument for the application of the law to the Associated Press and its editorial employees in the least. They are engaged, these editorial employees—I used the phrase in the court below that they were engaged in the manufacture of news, and the double implication of that caused me some embarrassment, and therefore I do not use that phrase here—they are engaged in the production of news, in its obtaining, in its formulation, in its preparation; but as truly a productive enterprise as that of the roller in the steel mill or the herder of cattle on the western plains or the agricultural laborer on his farm.

Now, of course, the Government is driven to some very old means in order

to sustain their contention on this subject. We hear again of the "throat" cases, *Stafford v. Wallace* (258 U. S. 495), and the rest. We hear of the railroad case, *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks* (281 U. S. 548) [reported in Chapter 4]. We hear of the strike cases, *Coronado Coal Co. v. United Mine Workers* (268 U. S. 295), and so on. Your Honors are so familiar with that that a word in differentiation would indicate our point of view. There is no throat here. There is no current here. We do not sit like the stockyards, abreast a current of commerce which other men are trying to conduct, and which by the Stock Yards Act they were forbidden from interrupting. This is our commerce, and what this law proposes when applied to us, is to regulate us, not in order that we may be prevented from interrupting the commerce from other people, but to regulate us, in order that we may be prevented from interrupting our own business—which is a horse of a very different color.

The railroad cases stand on their own footing. And I was interested to see the effort made by the learned opponents' brief to bring the doctrine of the strike cases to the support of this act. In the strike cases, as Your Honors have pointed out, there was a clear intent to interrupt interstate commerce, and interstate commerce was the object of attack.

Now here is the reasoning by which this act is supposed to bear on this situation: "consequently," says my learned friend, "where the situation in a particular enterprise"—and this act, if I am right, embraces all enterprises—"presents a reasonable likelihood"—no question here of certainty or inevitable result—"a reasonable likelihood that a dispute would occur which"—and we are supposed to imagine a dispute—"would involve an intent"—this hypothetical dispute would involve a hypothetical intent to restrain commerce—"to restrain commerce"—then the Board

can apply the statute to that enterprise.

There is a chain of hypotheses. We must first hypothecate a reasonable likelihood. We must next imagine a dispute. And third, as a third hypothesis, mounted upon the other two, must imagine that those who engage in the dispute would have an intent to restrain commerce; and then on that hypothesis we take possession of the enterprise and regulate it.

So much for the interstate-commerce features of the act, which I lay aside.

The second point is that the statute is a direct violation of the fifth amendment.

Justice SUTHERLAND. What amendment?

Mr. DAVIS. The fifth amendment. It is so because it is an invasion of freedom of contract between an employer and an employee who are engaged in a wholly private occupation. And as to which invasion no emergency exists or is so much as alleged.

It is a sweeping undertaking to regulate the right of men to sell their labor, and the right of men to buy it.

We understood that under *Adair v. United States* (208 U. S. 161) [reported in Chapter 4], *Coppage v. Kansas* (236 U. S. 1), and *Wolff Packing Co. v. Court of Industrial Relations* (262 U. S. 522), the power of the legislature to compel continuity on a business can only arise where the obligation to continue service by the owner and his employees is direct and is assumed when the business is entered upon. That is the criterion. And that in normal relations between employer and employee no Government, the fifth amendment standing, can undertake to step in and make contracts in their name.

We assert that the act is bad under the fifth amendment not only because it imposes this compulsory collective bargaining from which all permissive features have been removed, not only because of its scope, but because of the methods to which resort is had.

Now the learned Solicitor General says

that question is not in this case; that we are not concerned with the compulsory bargaining which the act undertakes to make, because that hand has not yet been laid upon us; that we are only entitled to concern ourselves with the discharge of this particular employee and the effort for his reinstatement.

To which our answer is, first, that the act is an entirety; that it is impossible to read the act and hold that it is susceptible of any separation; that the whole object and purpose of the act, the declared object and purpose, fall unless compulsory collective bargaining is the end and aim; that, moreover, in the order which the Board entered against us requiring us to reinstate this employee they also required us to abstain from restraining, interfering, or coercing him in his right to bargain collectively, as declared by section 7 of the act.

I shall skip this part of my argument partly in deference to the learned Solicitor General's assertion that I am quite outside the latitude of facts, and partly because this case is to be followed by others where I know learned counsel will develop this subject at greater length.

But let me indicate what are the specific points on which we think these provisions of the act are arbitrary and unreasonable.

First is that the employer, and the employer alone, is reached by this mandate. It is only the employer who is compellable to bargain. No such mandate is laid upon his employees or upon any association or union they may choose to form. On the contrary, not even is the duty of observance, after a bargaining has been had, laid upon the employees, for the thirteenth section of the act specifically provides that—

Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

A collectively bargaining employee may refuse to collectively bargain. The collec-

tively bargaining employee, after he has collectively bargained, has lost none of his right. He is given the collective right to strike whenever and wherever he sees fit. He arbitrarily says that he is subject to the majority rule. After a unit has once been chosen the vote of the majority of that unit makes them the exclusive bargaining agent.

Now, that is sought to be defended on the ground that that is democracy; that the system of majority rule is one which in this country, under our democratic institutions, we have become thoroughly accustomed to, and for which there is no substitute, and therefore, say the proponents of this act, it is quite formal and proper to write into the act the majority shall control for all.

But the analogy, if the Court please, is utterly lacking in foundation. Majority rule prevails under democracy in matters of government solely because no other organ has been found by which a democracy may express its will. There is no other method under a democracy by which the officers of the Government may be peacefully chosen, except by an acquiescence in the will of the majority. It is an integral part of democratic government *ex necessitate*, but there is no reason that because of that it is *ex necessitate* a part of the dealings of the individual men, with their individual rights of person and of property. There is no reason, because a man is compelled by the very existence and form of his government, to yield to the majority, why he should be compelled against his will to appoint some other agent to dispose of his own individual rights. When a law undertakes to deprive a majority, large or small it matters little, of their right against their will, and their own labor, and their own terms, and their own conditions, the fifth amendment is clearly invaded.

And it is not, may I say, a thing of which the employer cannot complain. Because, of course, to deny the minority

the right to deal with the employer is to deny to the employer the right to deal with the minority. There is a reciprocal relation, and it is as much the invasion of one as it is the invasion of the other.

I have referred to the closed union shop. I have referred to this arbitrary selection of bargaining units. I have referred to the outlawing of company unions, and I pass that whole subject to go on to what seems to me perhaps the most important subject I have to present to this Court.

I assert this act, as applied to the Associated Press, is a direct, palpable, undisguised attack upon the freedom of the press.

Now, let me remind Your Honors of the nature and character of the parties involved in this controversy. The Associated Press, it is true, publishes no newspaper; but, as the Government has been at great pains in their brief to demonstrate, it is the largest of the news-gathering agencies of the country, and its activities are nationwide. It supplies, under contract with its members, a very large part of the news they furnish the reading public of America, and under contract which requires them, if they take it at all, to take it as the Associated Press gives it, and so much as they publish to publish in that form, with credit to the Associated Press.

The Labor Board was at pains to admit copies of newspapers here, there, and elsewhere, showing how many columns of their news bore the credit line of the Associated Press. That was in support of the argument that a suspension of news in the Associated Press office would cut off the newspaper, for which, may I say in passing, there is a lack of factual basis. Desperate effort was made to get the manager of the Associated Press to admit that if the employees stopped in the New York office where Watson was employed, that would tie up the system, and he quietly declined to agree to that.

The Associated Press in the news columns is as integral a part of the press of

the United States as the *Washington Post* or the *New York Times*. Indeed, without derogating from any individual publication, it may be said to be far more important than any one of them. There is no agency in this country that surpasses—I question greatly if there is any paper or agency in this country that equals—it in its furnishing of the information to the American public.

Who is Watson? Watson was not a mechanical employee. He was not a telegrapher whose only function is to send over the wires what is given him. He was not a man to whom manuscript was sent, and he had nothing but a mechanical function in connection with it. He was the writer, the reporter, the rewriter, the composer of headlines. As he himself said, he wrote the "leads." As I understand that newspaper phrase, it means the opening paragraphs of a story where they are supposed to give you the whole gist of it for tired businessmen in a few sentences. And I think somebody—I won't risk the name, because I would probably be wrong—let some epigrammatist says "If I may write the songs of a nation, I care not who makes its laws." And I think it might be said in the newspaper world that "If I write the news of the nation, I care not who writes its editorials." And I think we might pass on from that still further and say, "If I may write the headlines and the leads of the news, I care not who writes the rest of the two-column story."

That is the business in which Watson was engaged. Now it is proposed to say to the Associated Press, "You cannot put somebody else in that chair. You must take Watson and Watson's work and Watson's selection, broadcast that over your channels of communication throughout the United States."

Is that an invasion of the freedom of the press, or is it not? What is the freedom of the press? Why, the learned Solicitor General says in his brief a newspaper publisher does not have a special

immunity from the application of general legislation, nor a special privilege to destroy the recognized rights and liberties of others. And of course he does not, and who would so contend. But he does have a right to live under the law, and the law, the supreme law, is that the press shall be free—not partially free—not free with discretion in this or that public officer—but free—not only free from advance censorship which says what shall be published or how much, but, broader than that, that it shall have the right to formulate, to disseminate, the news of the day to the people of the United States, so long as it does not invade the laws of libel or incite to some form of crime.

And nothing less than that can be guaranteed by the freedom of the press—not as a privilege to the newspaper only, not that he may stand a class apart above his fellows, but, as Your Honors have said, if we fetter the press, we fetter ourselves, and in order that democratic government may be fed with the only thing which can keep it alive the Constitution forbids the invasion of this field.

Now, I need say no more in defense of that doctrine. What about its application? They say that our only complaint of any invasion is that Watson would be biased as a labor-union man in the news he might collect, and therefore we rely solely on bias. As the brief of the *amicus curiae* states, we are reduced to the status of asserting that a labor-union man would be more biased than a nonunion man, and of course that has nothing to do with it in matter of principle.

It is not that he may be more biased, not that he may be less biased but it is that those who publish and print the news must have the right to choose the people by whom the news is to be written before it is printed. For you cannot divorce in this field the author from his product. You cannot have Dickens' novels without Dickens, and although that lies in the field of creative fiction, when it

comes to a report of fact you cannot have Macaulay's novels [history?] without Macaulay. What is written is the news, and the man who writes it is utterly inseparable from it. Two men may go and witness the same state of facts ocularly, and they write their stories. One story may be live and vibrant and appealing to the public imagination, or, if you choose it may be slanted and colored so as to distort the facts; and another man who sees exactly the same thing will write something entirely different.

Can the newspaper be free if it is not able to choose between those authors? Suppose one of our dictator neighbors in Europe should say—and I have no doubt it has been said—to the press of Germany or of Italy or of Russia or what you will—to the newspaper publisher, "You shall not dismiss this man because he is a member of the Nazi or the Fascist or the Communist Party. Of course, you may do otherwise, dismiss him for any other reason, but you cannot dismiss him for that reason." Is it conceivable that that would leave the press free? Is it conceivable that that would not be an invasion of the newspaper proprietor's rights, if he had any? Indeed, what more effective engine could dictatorial power take than to name the men who shall furnish the food of facts upon which the public must feed? . . .

* * * *

The Court held the Railway Labor Act constitutional in *Virginian Railway v. System Federation No. 40*, 300 U. S. 515, 57 Sup. Ct. 592, on March 29, 1937, with no dissenting voice. But it did not follow that the N. L. R. A. would be upheld, unless the President's plan for reorganizing the Supreme Court had made the judges feel it necessary to show that they were not opposed to all progressive legislation.

On April 12, 1937, the Court handed down decisions in a group of N. L. R. A. cases, including *Associated Press and Jones and Laughlin*. The majority upheld the Board in every case. Four judges dissented in the *As-*

sociated Press case on the ground that freedom of the press was invaded. The same four gave more general reasons for dissenting in an opinion applying not only to the Jones and Laughlin Steel Corporation but also to the *Fruehauf Trailer Company* and the *Friedman-Harry Marks Clothing Company, Inc.*, cases. Their reasoning was based almost ex-

clusively on the idea that Congress did not and should not have the power to stretch its regulations so far by means of the commerce clause. They did not, however, raise any objection to applying the act to an interstate bus line, the *Washington, Virginia and Maryland Coach Company*. (All these N. L. R. A. cases are in 301 U. S.)

NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORPORATION

Supreme Court of the United States. 1937.
301 U. S. 1; 57 Sup. Ct. 615; 81 L. Ed. 893.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

In a proceeding under the National Labor Relations Act of 1935, the National Labor Relations Board found that the petitioner, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees. . . .

Contesting the ruling of the Board, the respondent argues (1) that the Act is in reality a regulation of labor relations and not of interstate commerce; (2) that the Act can have no application to the respondent's relations with its production employees because they are not subject to regulation by the federal government; and (3) that the provisions of the Act violate Section 2 of Article III and the Fifth and Seventh Amendments of the Constitution of the United States. . . .

While respondent criticises the evi-

dence and the attitude of the Board, which is described as being hostile toward employers and particularly toward those who insisted upon their constitutional rights, respondent did not take advantage of its opportunity to present evidence to refute that which was offered to show discrimination and coercion. In this situation, the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose of the discharge of the employees are concerned. Upon that point it is sufficient to say that the evidence supports the findings of the Board that respondent discharged these men "because of their union activity and for the purpose of discouraging membership in the union." We turn to the questions of law which respondent urges in contesting the validity and application of the Act.

First. The scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within

the nation. The argument seeks support in the broad words of the preamble (section one) and in the sweep of the provisions of the Act, and it is further insisted that its legislative history shows an essential universal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. *Schechter Corporation v. United States*, 295 U. S. 495, 549, 550, 554 [reported in Chapter 7]. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. *Id.*

But we are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. . . .

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. . . .

The term "affecting commerce" means in commerce, or burdening or obstructing com-

merce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. [N. L. R. A., Sec. 2 (7).]

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. See *Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548, 570 [reported in Chapter 4]; *Schechter Corporation v. United States*, *supra*, pp. 544, 545; *Virginian Railway v. System Federation*, [300 U. S. 515]. It is the effect upon commerce, not the source of the injury, which is the criterion (*Second Employers' Liability Cases*, 223 U. S. 1, 51). Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Second. The unfair labor practices in question.— . . . In its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." *Texas & N. O. R. Co. v. Railway Clerks*, *supra*. We have reasserted

the same principle in sustaining the application of the Railway Labor Act as amended in 1934. *Virginian Railway Co. v. System Federation*, No. 40, *supra*.

Third. The application of the Act to employees engaged in production.—The principle involved.—Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. *Kidd v. Pearson*, 128 U. S. 1, 20, 21; *United Mine Workers v. Coronado Co.*, 259 U. S. 344, 407, 408 [reported in Chapter 1]; *Oliver Iron Co. v. Lord*, 262 U. S. 172, 178; *United Leather Workers v. Herkert*, 265 U. S. 457, 465; *Industrial Association v. United States*, 268 U. S. 64, 82; *Coronado Co. v. United Mine Workers*, 268 U. S. 295, 310; *Schechter Corporation v. United States*, *supra*, p. 547; *Carter v. Carter Coal Co.*, 298 U. S. 238, 304, 317, 327.

The Government distinguishes these cases. The various parts of respondent's enterprise are described as interdependent and as thus involving "a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business." It is urged that these activities constitute a "stream" or "flow" of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act. *Stafford v. Wallace*, 258 U. S. 495. The Court found that the stockyards were but a "throat" through which the current of commerce flowed and the transactions which there occurred could not be separated from that movement.

Hence the sales at the stockyards were not regarded as merely local transactions, for while they created "a local change of title" they did not "stop the flow," but merely changed the private interests in the subject of the current. Distinguishing the cases which upheld the power of the State to impose a non-discriminatory tax upon property which the owner intended to transport to another State, but which was not in actual transit and was held within the State subject to the disposition of the owner, the Court remarked:

The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.

Id., p. 526. See *Minnesota v. Blasius*, 290 U. S. 1, 8. Applying the doctrine of *Stafford v. Wallace*, *supra*, the Court sustained the Grain Futures Act of 1922 with respect to transactions on the Chicago Board of Trade, although these transactions were "not in and of themselves interstate commerce." Congress had found that they had become "a constantly recurring burden and obstruction to that commerce." *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 32; compare *Hill v. Wallace*, 259 U. S. 44, 69. See also, *Tagg Bros v. Moorhead*, 280 U. S. 420.

Respondent contends that the instant case presents material distinctions. Respondent says that the Aliquippa plant is extensive in size and represents a large investment in buildings, machinery and equipment. The raw materials which are brought to the plant are delayed for long periods and, after being subjected to manufacturing processes, "are changed substantially as to character, utility and value." The finished products which emerge "are to a large extent manufactured without reference to pre-existing orders and contracts and are entirely different from the raw materials which enter at the other end." Hence respondent argues

that "If importation and exportation in interstate commerce do not singly transfer purely local activities into the field of congressional regulation, it should follow that their combination would not alter the local situation." . . .

We do not find it necessary to determine whether these features of Defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement." . . .

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the federal Anti-Trust Act. . . .

. . . the Anti-Trust Act has been applied to the conduct of employees engaged in production. *Loewe v. Lawlor*, [whose sequel is reported in Chapter 3]; *Coronado Coal Co. v. United Mine Workers*, *supra*; *Bedford Cut Stone Co. v. Stonecutters Association*, 274 U. S. 29 [reported in Chapter 3]. See, also, *Local 167 v. United States*, 291 U. S. 293, 297; *Schechter Corporation v. United States*, *supra*. The decisions dealing with the question of that application illustrate both the principle and its limitation. Thus, in the first *Coronado* case, the Court held that min-

ing was not interstate commerce, that the power of Congress did not extend to its regulation as such, and that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, notwithstanding the broad terms of that statute. A similar conclusion was reached in *United Leather Workers v. Herkert*, *supra*, *Industrial Association v. United States*, *supra*, and *Levering & Garriques Co. v. Morrin*, 289 U. S. 103, 107. But in the first *Coronado* case the Court also said that “if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint.” 259 U. S. p. 408. And in the second *Coronado* case the Court ruled that while the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the “intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.” 268 U. S. p. 310. And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees’ conduct. *Industrial Association v. United States*, 268 U. S. p. 81. What was absent from the evidence in the first *Coronado* case appeared in the second and the Act was accordingly applied to the mining employees.

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case,

supra, we found that the effect there was so remote as to be beyond the federal power. To find “immediacy or directness” there was to find it “almost everywhere,” a result inconsistent with the maintenance of our federal system. In the *Carter* case, *supra*, the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

Fourth. Effects of the unfair labor practice in respondent's enterprise.—Giving full weight to respondent's contention with respect to a break in the complete continuity of the “stream of commerce” by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into

which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. The opinion in the case of *Virginian Railway Co. v. System Federation, No. 40, supra*, points out that, in the case of carriers, experience has shown that before the amendment, of 1934, of the Railway Labor Act "when there was no dispute as to the organizations authorized to represent the employees and when there was a willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided." That, on the other hand, "a prolific source of dispute had been the maintenance by the railroad of company unions and the denial by railway management of the authority of representatives chosen by their employees." The opinion in that case also points to the large measure of success of the labor policy embodied in the Railway Labor Act. But with respect to the appropriateness of the recognition of self-organization and representation in the promotion of peace, the question is not essentially different in the case of employees in industries of such a character that interstate commerce is put in

jeopardy from the case of employees of transportation companies. And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!

These questions have frequently engaged the attention of Congress and have been the subject of many inquiries.¹ The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919-1920 with its far-reaching consequences.² The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.

Fifth. The means which the Act employs.—Questions under the due process clause and other constitutional restrictions.—Respondent asserts its right to conduct its business in an orderly manner

¹ See, for example, *Final Report of the Industrial Commission* (1902), vol. 19, p. 844; *Report of the Anthracite Coal Strike Commission* (1902), Sen. Doc. No. 6, 58th Cong., spec. sess.; *Final Report of Commission on Industrial Relations* (1916), Sen. Doc. No. 415, 64th Cong., 1st sess., vol. I; National War Labor Board, *Principles and Rules of Procedure* (1919), p. 4; Bureau of Labor Statistics, *Bulletin No. 287* (1921), pp. 52-64; *History of the Shipbuilding Labor Adjustment Board*, U. S. Bureau of Labor Statistics, *Bulletin No. 283*.

² See *Investigating Strike in Steel Industries*, Sen. Rept. No. 289, 66th Cong., 1st sess.

without being subjected to arbitrary restraints. What we have said points to the fallacy in the argument. Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *Texas & N. O. R. Co. v. Railway Clerks*, *supra*; *Virginian Railway Co. v. System Federation*, No. 40. Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious. The provision of Section 9 (a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in Section 2, Ninth, of the Railway Labor Act which was under consideration in *Virginian Railway Co. v. System Federation*, No. 40, *supra*. The decree which we affirmed in that case required the Railway Company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government,³ the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative

they had selected. It was taken "to prohibit the negotiation of labor contracts generally applicable to employees" in the described unit with any other representative than the one so chosen, "but not as precluding such individual contracts" as the Company might "elect to make directly with individual employees." We think this construction also applies to Section 9 (a) of the National Labor Relations Act.

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine."⁴ The Act expressly provides in Section 9 (a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. As we said in *Texas & N. O. R. Co. v. Railway Clerks*, *supra*, and repeated in *Virginian Railway Co. v. System Federation*, No. 40, the cases of *Adair v. United States*, 208 U. S. 161 [reported in Chapter 4], and *Coppage v. Kansas*, 236 U. S. 1, are inapplicable to legislation of this character. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coer-

³ See *Virginian Railway Co. v. System Federation* [300 U. S. 515], note 6.

⁴ See previous footnote.—C.R.

cion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge.

The Act has been criticized as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible. That it fails to provide a more comprehensive plan—with better assurances of fairness to both sides and with increased chances of success in bringing it about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 411; *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 227; *Miller v. Wilson*, 236 U. S. 373, 384; *Sproles v. Binford*, 286 U. S. 374, 396. The question in such cases is whether the legislature, in what it does prescribe, has gone beyond constitutional limits.

The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies. See *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and

hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. It is not necessary to repeat these rules which have frequently been declared. None of them appears to have been transgressed in the instant case. Respondent was notified and heard. It had opportunity to meet the charge of unfair labor practices upon the merits, and by withdrawing from the hearing it declined to avail itself of that opportunity. The facts found by the Board support its order and the evidence supports the findings. Respondent has no just ground for complaint on this score.

The order of the Board required the reinstatement of the employees who were found to have been discharged because of their "union activity" and for the purpose of "discouraging membership in the union." That requirement was authorized by the Act. Sec. 10 (c). In *Texas & N. O. R. Co. v. Railway Clerks*, *supra*, a similar order for restoration to service was made by the court in contempt proceedings for the violation of an injunction issued by the court to restrain an interference with the right of employees as guaranteed by the Railway Labor Act of 1926. The requirement of restoration to service, of employees discharged in violation of the provisions of that Act, was thus a sanction imposed in the enforcement of a judicial

decree. We do not doubt that Congress could impose a like sanction for the enforcement of its valid regulation. The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety.

Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. This part of the order was also authorized by the Act. Sec. 10 (c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." . . . It does not apply where the proceeding is not in the nature of a suit at common law. . . .

The instant case . . . is a statutory proceeding. . . .

Our conclusion is that the order of the Board was within its competency and that the Act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

*It is so ordered.*¹

The Supreme Court's decisions in April, 1937, encouraged unions to bring cases to the Board, led most companies to accept the law, and prevented lower courts from enjoining the Board and its operations. But some of the injunctions already outstanding against the Board were fought up to the Supreme Court. On January 31, 1938, the Court decided that a federal district court may not forbid an N. L. R. B. hearing. "Since the procedure be-

fore the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Courts of Appeals." The company must exhaust its administrative remedies before applying to the courts. *Myers v. Bethlehem Shipbuilding Corp., Ltd.*, 303 U. S. 41 (1938). Similarly the Court held that the Board has exclusive initial power to make an investigation to determine its jurisdiction; it is subject to review by the circuit courts. A federal district court may not enjoin the Board from conducting a public investigation, even though the company claims it is not engaged in interstate commerce. *Newport News Shipbuilding and Dry Dock Co. v. Schauffler*, 303 U. S. 54 (1938). (A later Supreme Court decision involving the same company, on a charge of maintaining a company union, is reported below.)

In later N. L. R. B. cases the Supreme Court continued to take a generous view of "interstate commerce," for instance in the case of the *Consolidated Edison Company* (quoted from for another purpose, below), 305 U. S. 197, 59 Sup. Ct. 206 (1938), a company all of whose sales of electricity were made within one state but upon whom several instrumentalities of interstate commerce depended for power.

Though, as we have just seen, the Court said that the act did not violate the Constitution in the procedures that it set up, we shall see later that in pressing for amendments to the law its critics often stressed these procedures, claiming for instance that there was not enough separation between the prosecuting and the trying functions.

The general principle that the Board's findings of fact, if supported by evidence, were to be conclusive and that the courts in reviewing Board decisions were to deal only with matters of law, was interpreted to mean that the courts would accept the findings if supported by "substantial evidence," for instance in the *Mackay Radio* case, 304 U. S. 333, 58 Sup. Ct. 904 (1938), reported below, and the *Consolidated Edison* case just mentioned. Since there is no good way to define "substantial evidence," Board findings were accepted and rejected by various circuit courts with varying degrees of trust in the Board; the possibility of appeal to the Supreme Court gave only a certain amount of uniformity.

¹ The dissent, applying to this and to several companion cases, is omitted. See the oral argument against the act in the *Associated Press* case, above. —C.R.

III. INTERFERENCE, DISCRIMINATION, AND BACK PAY

The interferences with unionization which are forbidden by the act include discrimination against unionists, favoritism to a labor organization, and refusal to bargain with a majority union. These will now be treated in three successive sections of this chapter. The last of the three depends on determining what union has the support of the majority, and this problem will be taken up in the following section on collective-bargaining elections.

Discrimination is an old and powerful weapon against unionization, which American legislatures have been trying to limit for about fifty years. It has sometimes been formalized in the yellow-dog contract, which we met in another connection in Chapter 2. The *Associated Press* and *Jones and Laughlin*, whose day in the Supreme Court is reported just above, were both accused of discrimination.

The rule against discrimination gives employees a sort of vague tenure right to their jobs; how much of a right it is depends on whether the Board and the courts put more or less burden of proof on the employee to show that he was fired or laid off for unionism rather than for inefficiency or the like. The Board requires that there be some positive evidence of anti-union motive, but often the employee has to rely largely on showing that he is as competent as others who were not fired.¹

A rule against discrimination for joining a union seems to call for a parallel rule barring discrimination for refusing to join.² In this connection Congress compromised. The parallel rule holds, but not in a shop in which a union which has a majority has been able to induce the employer to sign a closed-shop agreement.

¹ See also Stein and others, *Labor Problems in America*, pp. 654-57.

A firm may not refuse employment to an applicant, if it does so because of his union activity. *Phelps-Dodge Corp. v. N. L. R. B.*, U. S. Supreme Court, April 28, 1941.—C.R.

² We saw in the introduction to "Closed-Shop Demands," in Chapter 3, that an attempt has been made to deduce the illegality of a closed-shop demand (involving discrimination against non-members) from the public policy declared by a statute which assured employees freedom of organization.—C.R.

Related to discrimination against union members are a variety of interferences which the Board may condemn under Section 8 (1) of the act; for instance, anti-union statements by employers or supervisors. Like discrimination, these convey to the employees that the employer is opposed to unions and will take steps (such as discrimination) against them whenever he can.

Other sorts of interferences condemned under Section 8 (1) do not have the same effect, since they are hidden from the unionists. Spies may be engaged without the knowledge of the employees and may help the employer gradually to get rid of active unionists (discrimination); discharged unionists may be secretly blacklisted with other companies; union leaders may be bribed; undercover men may obtain union office and prevent union action, discourage membership, or incite unionists to violence which brings on reprisals by the police.³

A difficult problem confronts the Board when a union loses a strike and the company, which may have hired other workers during the strike, objects to rehiring the unionists. Its refusal is likely to seem to be a discriminatory one, tending to discourage men from union membership or activity, including striking. Since the act looks on men as employees until the strike is actually ended they may appeal to the Board for reinstatement. The rights of the strike-breaking employees have to be considered, and so does the complaint often voiced by the company that the strikers who are being refused employment were ones who used violence during the strike. See the *MacKay* and *Fansteel* cases, below. In the latter, the unionists' case was strengthened by their claim that the strike was caused by the company's unfair labor practice, for the statute grants the status of employee not only to those engaged in a cur-

³ See also Stein and others, *Labor Problems in America*, pp. 658-60.

The Board may not use a particular offense as the excuse for issuing a general order against "interference" (which would enable the Board, in case of future offenses, to go directly to court on a contempt charge, avoiding a new hearing before a trial examiner). *Express Publishing Co. v. N. L. R. B.*, 61 Sup. Ct. 693 (Feb. 14, 1941).—C.R.

rent labor dispute but also to those out of work because of an unfair labor practice.⁴

Discrimination is penalized not only by making the company rehire the man discriminated against (after which he may be discharged for any reason except union membership or activity) but also by making it pay

⁴ *Ibid.*, pp. 667-70.—C.R.

him the wages he has lost because of the discrimination. If he has held a job elsewhere meanwhile, his earnings on that job are subtracted from his claim. The Board held, in the *Republic Steel* case (the outcome of which is shown below), that if his interim work was government relief work, the employer should pay the relief agency the amount the agency had spent on the worker.

NATIONAL LABOR RELATIONS BOARD *v.* MACKAY RADIO & TELEGRAPH COMPANY

Supreme Court of the United States. 1938.
304 U. S. 333; 58 Sup. Ct. 904; 82 L. Ed. 1381.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals refused ¹ to decree enforcement of an order of the National Labor Relations Board.² We granted certiorari because of an asserted conflict of decision.³

The respondent, a California corporation, is engaged in the transmission and receipt of telegraph, radio, cable, and other messages between points in California and points in other states and foreign countries. It maintains an office in San Francisco for the transaction of its business wherein it employs upwards of sixty supervisors, operators and clerks, many of whom are members of Local No. 3 of the American Radio Telegraphists Association, a national labor organization; the membership of the local comprising "point-to-point" or land operators employed by respondent at San Francisco. Affiliated with the national organization also were locals whose members are exclusively marine operators who work upon ocean-going vessels. The respondent, at its San Francisco office, dealt with

committees of Local No. 3; and its parent company, whose headquarters were in New York, dealt with representatives of the national organization. Demand was made by the latter for the execution of agreements respecting terms and conditions of employment of marine and point-to-point operators. On several occasions when representatives of the union conferred with officers of the respondent and its parent company the latter requested postponement of discussion of the proposed agreements and the union acceded to the requests. In September, 1935, the union pressed for immediate execution of agreements and took the position that no contract would be concluded by the one class of operators unless an agreement were simultaneously made with the other. Local No. 3 sent a representative to New York to be in touch with the negotiations and he kept its officers advised as to what there occurred. The local adopted a resolution to the effect that if satisfactory terms were not obtained by September 23 a strike of the San Francisco point-to-point operators should be called. The national officers determined on a general strike in view of the unsatisfactory state of the negotiations. This fact was communicated to Local No. 3 by its representative in New York and the local officers called out the employes of the San Francisco office. At midnight Friday, Oc-

¹ 87 F. (2d) 611; 92 F. (2d) 761.

² 1 N. L. R. B. 201.

³ See *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. (2d) 134; *National Labor Relations Board v. Bell Oil & Gas Co.*, 91 F. (2d) 509; *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138; *Black Diamond S. S. Corp. v. National Labor Relations Board*, 94 F. (2d) 875.

tober 4, 1935, all the men there employed went on strike. The respondent, in order to maintain service, brought employes from its Los Angeles office and others from the New York and Chicago offices of the parent company to fill the strikers' places.

Although none of the San Francisco strikers returned to work Saturday, Sunday, or Monday, the strike proved unsuccessful in other parts of the country and, by Monday evening, October 7th, a number of the men became convinced that it would fail and that they had better return to work before their places were filled with new employes. One of them telephoned the respondent's traffic supervisor Monday evening to inquire whether the men might return. He was told that the respondent would take them back and it was arranged that the official should meet the employes at a downtown hotel and make a statement to them. Before leaving the company's office for this purpose the supervisor consulted with his superior, who told him that the men might return to work in their former positions but that, as the company had promised eleven men brought to San Francisco they might remain if they so desired, the supervisor would have to handle the return of the striking employes in such fashion as not to displace any of the new men who desired to continue in San Francisco. A little later the supervisor met two of the striking employes and gave them a list of all the strikers together with their addresses, and the telephone numbers of those who had telephones, and it was arranged that these two employes should telephone the strikers to come to a meeting at the Hotel Bellevue in the early hours of Tuesday, October 8th. In furnishing this list the supervisor stated that the men could return to work in a body but he checked off the names of eleven strikers who he said would have to file applications for reinstatement which applications would be subject to the approval

of an executive of the company in New York. Because of this statement the two employes, in notifying the strikers of the proposed meeting, with the knowledge of the supervisor, omitted to communicate with the eleven men whose names had been checked off. Thirty-six men attended the meeting. Some of the eleven in question heard of it and attended. The supervisor appeared at the meeting and reiterated his statement that the men could go back to work at once but read from a list the names of the eleven who would be required to file applications for reinstatement to be passed upon in New York. Those present at the meeting voted on the question of immediately returning to work and the proposition was carried. Most of the men left the meeting and went to the respondent's office Tuesday morning, October 8th, where on that day they resumed their usual duties. Then or shortly thereafter six of the eleven in question took their places and resumed their work without challenge. It turned out that only five of the new men brought to San Francisco desired to stay.

Five strikers who were prominent in the activities of the union and in connection with the strike, whose names appeared upon the list of eleven, reported at the office at various times between Tuesday and Thursday. Each of them was told that he would have to fill out an application for employment; that the roll of employees was complete, and that his application would be considered in connection with any vacancy that might thereafter occur. These men not having been reinstated in the course of three weeks, the secretary of Local No. 3 presented a charge to the National Labor Relations Board that the respondent had violated Section 8(1) and (3) of the National Labor Relations Act. Thereupon the Board filed a complaint charging that the respondent had discharged and was refusing to employ the five men who had not been reinstated to their positions for the

reason that they had joined and assisted the labor organization known as Local No. 3 and had engaged in concerted activities with other employes of the respondent for the purpose of collective bargaining and other mutual aid and protection; that by such discharge respondent had interfered with, restrained, and coerced the employes in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act and so had been guilty of an unfair labor practice within the meaning of Section 8(1) of the Act. The complaint further alleged that the discharge of these men was a discrimination in respect of their hire and tenure of employment and a discouragement of membership in Local No. 3, and thus an unfair labor practice within the meaning of Section 8(3) of the Act.

The respondent filed an answer denying the allegations of the complaint, and moved to dismiss the proceeding on the ground that the Act is unconstitutional. The motion was taken under advisement by the Board's examiner and the case proceeded to hearing. After the completion of its testimony the Board filed an amended complaint to comport with the evidence, in which it charged that the respondent had refused to re-employ the five operators for the reason that they had joined and assisted the labor organization known as Local No. 3 and engaged with other employes in concerted activities for the purpose of collective bargaining and other mutual aid and protection; that the refusal to re-employ them restrained and coerced the employes in the exercise of rights guaranteed by Section 7 and so constituted an unfair labor practice within Section 8(1) of the Act. The amended complaint further asserted that the refusal to re-employ the men discriminated in regard to their hire and tenure of employment and discouraged membership in Local No. 3 and thus amounted to an unfair labor practice under Section 8(3) of the Act. The respondent entered a general

denial to the amended complaint and presented its evidence. At the conclusion of the testimony the Board transferred the cause for further hearing before the members of the Board at Washington and after oral argument and the filing of a brief, made its findings of fact.

The subsidiary or evidentiary facts were found in great detail and, upon the footing of them, the Board reached conclusions of fact to the effect that Local No. 3 is a labor organization within the meaning of the Act; that "by refusing to reinstate to employment" the five men in question, "thereby discharging said employees," the respondent by "each of said discharges," discriminated in regard to tenure of employment and thereby discouraged membership in the labor organization known as Local No. 3, and, by the described acts, "has interfered with, restrained, and coerced its employes in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act." As conclusions of law the Board found that the respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act. It entered an order that respondent cease and desist from discharging, or threatening to discharge, any of its employes for the reason that they had joined or assisted Local No. 3 or otherwise engaged in union activities; from interfering with, restraining or coercing its employes in the exercise of the rights guaranteed by Section 7 of the Act; offer the five men immediate and full reinstatement to their former positions, without prejudice to rights and privileges previously enjoyed, and make each of them whole for any loss of wages due to their discharge; post notices that the respondent would not discharge or discriminate against members of, or those desiring to become members of, the union, and keep the notices posted for thirty days.

[To the Circuit Court the firm stated that the Act violated Article III and Amendments V, VII, and X of the Constitution; that the order was arbitrary;] that the trial examiner erred in his rulings on evidence; . . . and that the Board's findings of fact and conclusions of law were erroneous.

Upon the hearing before the Circuit Court of Appeals one judge held that the action of the Board was within the power sought to be conferred upon it by the statute but that the grant of power violated the due process clause of the Fifth Amendment and the award of back pay to the employes, without a jury trial, violated the Seventh Amendment. Another judge held that as the statute defined employes to include a person whose work had ceased "as a consequence of, or in connection with, any current labor dispute," and since there was no allegation, evidence, or finding as to such a dispute, the strikers had ceased to be employes within the meaning of the Act and the respondent's treatment of them could not violate the Act. One judge dissented, holding that the Board's order was within its statutory authority and did not violate the Constitution. A petition and supplemental petition for rehearing were granted and, after argument, the court reaffirmed its former decision. The judge who had previously declared the Board's action within the terms of the statute, but unconstitutional, construed the Act as not intended to work the unconstitutional result of compelling an employer to enter into a contract of employment against his will and, hence, as requiring only that the strikers be reinstated to the position of applicants for employment rather than employes. The other judges adhered to the views they had previously expressed.

The petitioner contends the court erred in holding that men who struck because of a failure of negotiations concerning wages and terms of employment ceased to be employes within the meaning of the

statute; erred in not holding it an unfair labor practice, forbidden by the statute, for an employer to discriminate because of union activities in the reinstatement of men who have gone on strike because of a failure of negotiations concerning wages and terms of employment; erred in failing to hold that the Act authorizes the Board to order reinstatement of persons thus discriminated against; and one of the judges erred in holding that the Act, if construed to authorize the Board to require such reinstatement, violates the Fifth Amendment.

On the other hand, the respondent insists that it was not accorded due process of law because the unfair labor practice charged in the original complaint was abandoned and the action of the Board was based upon a conclusion of fact not within the issues presented; that there is no basis for the Board's order because there is no finding that the strikers ceased work as a consequence of, or in connection with, any labor dispute, as defined in the statute; that the Act does not empower the Board to compel an employer to re-employ or reinstate those who have abandoned negotiations and gone on strike prior to any unfair labor practice, where the employer, after the strike is effective, and before committing any unfair labor practice, has permanently employed others in place of the strikers; that, if the Act be held to authorize the Board's order, it violates the Fifth Amendment; that Article III of the Constitution requires that the court render its independent judgment upon the quasi-jurisdictional facts upon which the Board's order was based; that the Board's order was, in the light of the facts, so arbitrary and capricious as to warrant the court's refusal to enforce it; and that the case is not properly before us because certiorari was not sought within the time fixed by law.

We hold that we have jurisdiction; that the Board's order is within its competence

and does not contravene any provision of the Constitution.

First. Within the thirty days prescribed by the rules of the Circuit Court of Appeals the petitioner moved for a rehearing and for leave, if deemed appropriate, to take further evidence and add the same to the record before the Board. While this application was pending a supplemental petition for rehearing was presented. During the term the court entertained both petitions and granted a rehearing and, after oral argument and submission of briefs, wrote further opinions based upon the petitions for rehearing. We think the court had not lost jurisdiction of the cause; that its final judgment was the order entered upon the petitions for rehearing and that the three months within which the petitioner must apply for certiorari ran from the date of the order dismissing the petition for rehearing and confirming the original order.

Second. Under the findings the strike was a consequence of, or in connection with, a current labor dispute as defined in Section 2 (9) of the Act. That there were pending negotiations for the execution of a contract touching wages and terms and conditions of employment of point-to-point operators cannot be denied. But it is said the record fails to disclose what caused these negotiations to fail or to show that the respondent was in any wise in fault in failing to comply with the union's demands; and, therefore, for all that appears, the strike was not called by reason of fault of the respondent. The argument confuses a current labor dispute with an unfair labor practice defined in Section 8 of the Act. True, there is no evidence that respondent had been guilty of any unfair labor practice prior to the strike but within the intent of the Act there was an existing labor dispute in connection with which the strike was called. The finding is that the strike was deemed "advisable in view of the unsatisfactory state of the negotiations" in New York. It was un-

necessary for the Board to find what was in fact the state of the negotiations in New York when the strike was called, or in so many words that a labor dispute as defined by the Act existed. The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute.

Third. The strikers remained employes under Section 2 (3) of the Act which provides: "The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, . . ." Within this definition the strikers remained employes for the purpose of the Act and were protected against the unfair labor practices denounced by it.

Fourth. It is contended that the Board lacked jurisdiction because respondent was at no time guilty of any unfair labor practice. Section 8 of the Act denominates as such practice action by an employer to interfere with, restrain, or coerce employes in the exercise of their rights to organize, to form, join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or "by discrimination in regard to . . . tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ." There is no evidence and no finding that the respondent was guilty of any unfair labor practice in connection with the negotiations in New York. On the contrary, it affirmatively appears that the respondent was negotiating with the authorized representatives of the union. Nor was it an unfair labor practice to replace the striking employes with others in an

effort to carry on the business. Although Section 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.⁴ The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employees by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employees. Any such discrimination in putting them back to work is, therefore, prohibited by Section 8.

Fifth. The Board's findings as to discrimination are supported by evidence. We shall not attempt a discussion of the conflicting claims as to the proper conclusions to be drawn from the testimony. There was evidence, which the Board credited, that several of the five men in question were told that their union activities made them undesirable to their employer; and that some of them did not return to work with the great body of the men at 6 o'clock on Tuesday morning because they understood they would not be allowed to go to work until the superior officials had passed upon their applications. When they did apply at times between Tuesday morning and Thursday

they were each told that the quota was full and that their applications could not be granted in any event until a vacancy occurred. This was on the ground that five of the eleven new men remained at work in San Francisco. On the other hand, six of the eleven strikers listed for separate treatment who reported for work early Tuesday morning, or within the next day or so, were permitted to go back to work and were not compelled to await the approval of their applications. It appears that all of the men who had been on strike signed applications for re-employment shortly after their resumption of work. The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men and excluding five who were active union men, the respondent's officials discriminated against the latter on account of their union activities and that the excuse given that they did not apply until after the quota was full was an afterthought and not the true reason for the discrimination against them.

As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the ground of skill or ability but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike but it is found that the preparation and use of the list, and the action taken by respondent, were with the purpose to discriminate against those most active in the union. There is evidence to support these findings.

Sixth. The Board's order does not violate the Fifth Amendment. . . .

Seventh. The affirmative relief ordered by the Board was within its powers and its order was not arbitrary or capricious. . . .

⁴ Compare *National Labor Relations Board v. Bell Oil & Gas Co.*, 91 F. (2d) 509.

Eighth. The respondent was not denied a hearing with respect to the offense found by the Board. [The respondent, the Mackay Company, had made a number of objections such as that the complaint was rewritten after all the evidence was in and that the Board's findings did not include a statement that there was a current labor dispute which preserved the five workers' employee status.]

. . . While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory.

At the conclusion of the testimony, and prior to oral argument before the examiner, the Board transferred the proceeding to Washington to be further heard before the Board. It denied respondent's motion to resubmit the cause to the trial examiner with directions to prepare and file an intermediate report. In the Circuit Court of Appeals the respondent assigned error to this ruling. It appears that oral argument was had and a brief was filed with the Board after which it made its findings of fact and conclusions of law. The re-

spondent now asserts that the failure of the Board to follow its usual practice of the submission of a tentative report by the trial examiner and a hearing on exceptions to that report deprived the respondent of opportunity to call to the Board's attention the alleged fatal variance between the allegations of the complaint and the Board's findings. What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare *Morgan v. United States*, 298 U. S. 468, 478. The contention that the respondent was denied a full and adequate hearing must be rejected.

Ninth. The other contentions of the respondent are overruled because foreclosed by earlier decisions of this court.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to that court for further proceedings in conformity with this opinion.

MR. JUSTICE REED and MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

NATIONAL LABOR RELATIONS BOARD *v.* FANSTEEL METALLURGICAL CORPORATION

Supreme Court of the United States. 1939.

306 U. S. 240; 59 Sup. Ct. 490; 83 L. Ed. 469.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Circuit Court of Appeals set aside an order of the National Labor Relations Board requiring respondent to desist from labor practices found to be in violation of the National Labor Relations Act and to offer reinstatement to certain discharged employees with back pay. While the other portions of the Board's order are under review, the principal question presented

relates to the authority of the Board to require respondent to reinstate employees who were discharged because of their unlawful conduct in seizing respondent's property in what is called a "sit-down strike."

Respondent, Fansteel Metallurgical Corporation, is engaged at North Chicago, Illinois, in the manufacture and sale of products made from rare metals. No question is raised as to the intimate rela-

tion of its operations to interstate commerce or the effect upon that commerce of the unfair labor practices with which the corporation is charged. The findings of the Board show that in the summer of 1936 a group of employees organized Lodge 66 under the auspices of a committee of the Amalgamated Association of Iron, Steel and Tin Workers of North America; that respondent employed a "labor spy" to engage in espionage within the Union and his employment was continued until about December 1, 1936; that on September 10, 1936, respondent's superintendent was requested to meet with a committee of the Union and the superintendent required that the committee should consist only of employees of five years' standing; that a committee, so constituted, presented a contract relating to working conditions; that the superintendent objected to "closed-shop and check-off provisions" and announced that it was respondent's policy to refuse recognition to "outside" unions; that on September 21, 1936, the superintendent refused to confer with the committee in which an "outside" organizer had been included; that meanwhile, and later, respondent's representatives sought to have a "company union" set up but the attempt proved abortive; that from November, 1936, to January, 1937, the superintendent required the president of the Union to work in a room adjoining the superintendent's office with the purpose of keeping him away from the other workers; that while in September, 1936, the Union did not have a majority of the production and maintenance employees, an appropriate unit for collective bargaining, by February 17, 1937, 155 of respondent's 229 employees in that unit had joined the Union and had designated it as their collective bargaining representative; that on that date, a committee of the Union met twice with the superintendent who refused to bargain with the Union as to rates of pay, hours and conditions of

employment, the refusal being upon the ground that respondent would not deal with an "outside" union.

Shortly after the second meeting in the afternoon of February 17th the Union committee decided upon a "sit-down strike" by taking over and holding two of respondent's "key" buildings. These were thereupon occupied by about 95 employees. Work stopped and the remainder of the plant also ceased operations. Employees who did not desire to participate were permitted to leave, and a number of Union members who were on the night shift and did not arrive for work until after the seizure did not join their fellow members inside the buildings. At about six o'clock in the evening the superintendent, accompanied by police officials and respondent's counsel, went to each of the buildings and demanded that the men leave. They refused and respondent's counsel "thereupon announced in loud tones that all the men in the plant were discharged for the seizure and retention of the buildings." The men continued to occupy the buildings until February 26, 1937. Their fellow members brought them food, blankets, stoves, cigarettes and other supplies.

On February 18th, respondent obtained from the state court an injunction order requiring the men to surrender the premises. The men refused to obey the order and a writ of attachment for contempt was served on February 19th. Upon the men's refusal to submit, a pitched battle ensued and the men successfully resisted the attempt by the sheriff to evict and arrest them. Efforts at mediation on the part of the United States Department of Labor and the Governor of Illinois proved unavailing. On February 26th the sheriff with an increased force of deputies made a further attempt and this time, after another battle, the men were ousted and placed under arrest. Most of them were eventually fined and given jail sentences for violating the injunction.

Respondent on regaining possession undertook to resume operations and production gradually began. By March 12th the restaffing was approximately complete. A large number of the strikers, including many who had participated in the occupation of the buildings, were individually solicited to return to work with back pay but without recognition of the Union. Some accepted the offer and were reinstated; others refused to return unless there were union recognition and mass reinstatement and were still out at the time of the hearing before the Board. New men were hired to fill the positions of those remaining on strike.

Meanwhile the Union was not inactive. On March 3d and 5th there were requests, which respondent refused, for meetings to consider the recognition of the Union for collective bargaining. There was no collective request for reinstatement of all the strikers. The position of practically all the strikers who did not go back, and who were named in the complaint filed with the Board, was "that they were determined to stay out until the Union reached a settlement with the respondent."

Early in April a labor organization known as Rare Metal Workers of America, Local No. 1, was organized among respondent's employees. There was a meeting in one of respondent's buildings on April 15th, which was attended by about 200 employees and the balloting resulted in a vote of 185 to 15 in favor of the formation of an "independent" organization. Another meeting was held soon after for the election of officers. Respondent accorded these efforts various forms of support. The Board concluded that the Rare Metal Workers of America, Local No. 1, was the result of the respondent's "anti-union campaign" and that respondent had dominated and interfered with its formation and administration.

Upon the basis of these findings and its conclusions of law, the Board made its order directing respondent to desist from

interfering with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing as guaranteed in Section 7 of the Act; from dominating or interfering with the formation of administration of the Rare Metal Workers of America, Local No. 1, or any other labor organization of its employees or contributing support thereto; and from refusing to bargain collectively with the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of the employees described. The Board also ordered the following affirmative action which it was found would "effectuate the policies" of the Act;—that is, upon request, to bargain collectively with the Amalgamated Association as stated above; to offer, upon application, to the employees who went on strike on February 17, 1937, and thereafter, "immediate and full reinstatement to their former positions," with back pay, dismissing, if necessary, all persons hired since that date; to withdraw all recognition from Rare Metal Workers of America, Local No. 1, as a representative of the employees for the purpose of dealing with respondent as to labor questions and to "completely disestablish" that organization as such representative; and to post notices of compliance. 5 N. L. R. B. 930.

The Board found that respondent had not engaged in unfair labor practices by "discrimination in regard to hire or tenure of employment" in order to "encourage or discourage membership in any labor organization," and accordingly the complaint under Section 8 (3) of the Act was dismissed. *Id.*

On respondent's petition, the Circuit Court of Appeals set aside the Board's order, 98 F. 2d 375, and this Court granted certiorari. November 21, 1938.

First.—The unfair labor practices. The Board concluded that by "the anti-union statements and actions" of the superin-

tendent on September 10, 1936, and September 21, 1936, by "the campaign to introduce into the plant a company union," by "the isolation of the union president from contact with his fellow employees," and by the employment and use of a "labor spy," respondent had interfered with its employees, and restrained and coerced them, in the exercise of their right to self-organization guaranteed in Section 7 of the Act and thus had engaged in an unfair labor practice under Section 8 (1) of the Act.

Owing to the fact that in September, 1936, the Union did not have a majority of the employees in the appropriate unit, the Board held that it was precluded from finding unfair labor practices in refusing to bargain collectively at that time, but the Board found that there was such a refusal on February 17, 1937, when the Union did have a majority of the employees in the appropriate unit, and that this constituted a violation of Section 8 (5).

These conclusions are supported by the findings of the Board and the latter in this relation have substantial support in the evidence.

Second.—The discharge of the employees for illegal conduct in seizing and holding respondent's buildings. The Board does not now contend that there was not a real discharge on February 17th when the men refused to surrender possession. The discharge was clearly proved.

Nor is there any basis for dispute as to the cause of the discharge. Representatives of respondent demanded that the men leave and on their refusal announced that they were discharged "for the seizure and retention of the buildings." The fact that it was a general announcement applicable to all the men in the plant who thus refused to leave does not detract from the effect of the discharge either in fact or in law.

Nor is it questioned that the seizure and retention of respondent's property

were unlawful. It was a high-handed proceeding without shadow of legal right. It became the subject of denunciation by the state court under the state law, resulting in fines and jail sentences for defiance of the court's order to vacate and in a final decree for respondent as the complainant in the injunction suit.

This conduct on the part of the employees manifestly gave good cause for their discharge unless the National Labor Relations Act abrogates the right of the employer to refuse to retain in his employ those who illegally take and hold possession of his property.

Third.—The authority of the Board to require the reinstatement of the employees thus discharged. The contentions of the Board in substance are these: (1) That the unfair labor practices of respondent led to the strike and thus furnished ground for requiring the reinstatement of the strikers; (2) That under the terms of the Act employees who go on strike because of an unfair labor practice retain their status as employees and are to be considered as such despite discharge for illegal conduct; (3) That the Board was entitled to order reinstatement or re-employment in order to "effectuate the policies" of the Act.

(1) For the unfair labor practices of respondent the Act provided a remedy. Interference in the summer and fall of 1936 with the right of self-organization could at once have been the subject of complaint to the Board. The same remedy was available to the employees when collective bargaining was refused on February 17, 1937. But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. We may put on one side the contested questions as to the circum-

stances and extent of injury to the plant and its contents in the efforts of the men to resist eviction. The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.

As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrongdoers from its employ. To say that respondent could resort to the state court to recover damages or to procure punishment, but was powerless to discharge those responsible for the unlawful seizure would be to create an anomalous distinction for which there is no warrant unless it can be found in the terms of the National Labor Relations Act. We turn to the provisions which the Board invokes.

(2) In construing the Act in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 45, 46, we said that it "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them"; that the employer "may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for

other reasons than such intimidation and coercion." See, also, *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 132. Compare *Texas & New Orleans R. R. Co. v. Brotherhood*, 281 U. S. 548, 571; *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 559.

It is apparent under that construction of the Act that had there been no strike, and employees had been guilty of unlawful conduct in seizing or committing depredations upon the property of their employer, that conduct would have been good reason for discharge, as discharge on that ground would not be for the purpose of intimidating or coercing employees with respect to their right of self-organization or representation, or because of any lawful union activity, but would rest upon an independent and adequate basis.

But the Board, in exercising its authority under Section 10 (c) to reinstate "*employees*," insists that here the status of the employees was continued, despite discharge for unlawful conduct, by virtue of the definition of the term "*employee*" in Section 2 (3). By that definition the term includes

"any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, . . ."

We think that the argument misconstrues the statute. We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite

and unmistakable expression. We find no such expression in the cited provision.

We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, *supra*, p. 33. To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining. *Associated Press v. National Labor Relations Board*, *supra*. The conduct thus protected is lawful conduct. Congress also recognized the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands. Section 13 provides that nothing in the Act “shall be construed so as to interfere with or impede or diminish in any way the right to strike.” But this recognition of “the right to strike” plainly contemplates a lawful strike—the exercise of the unquestioned right to quit work. As we said in *National Labor Relations Board v. Mackay Radio & Telegraph Company*, 304 U. S. 333, 347, “if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the Act.” There is thus abundant opportunity for the operation of Section 2 (3) without construing it as countenancing lawlessness or as intended to support employees in acts of violence against the employer’s property by making it impossible for the employer to terminate the relation upon that independent ground.

Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the Union committee “to take over and hold two of the respondent’s ‘key’ buildings.”

It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of “the right to strike” to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve.

(3) The Board contends that its order is valid under the terms of the Act “regardless of whether the men remained employees.” The Board bases its contention on the general authority conferred by Section 10 (c), to require the employer to take such affirmative action as will “effectuate the policies” of the Act. Such action, it is argued, may embrace not only reinstatement of those whose status as employees has been continued by virtue of Section 2 (3), but also a requirement of the “re-employment” of those who have ceased to be employed.

The authority to require affirmative action to “effectuate the policies” of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes. Thus in *Consolidated Edison Company v. National Labor Relations Board* [see the section next below], we held that the authority to order affirmative action did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order. We held that the power to com-

mard affirmative action is remedial not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. Elections may be ordered to decide what representatives are desired by the majority of employees in appropriate units as determined by the Board. To secure the prevention of unfair labor practices by employers, complaints may be filed and heard and orders made. The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the opinion that to provide for the reinstatement or re-employment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure.

What we have said also meets the point that the question whether reinstatement or re-employment would effectuate the policies of the Act is committed to the decision of the Board in the exercise of

its discretion subject only to the limitation that its action may not be "arbitrary, unreasonable or capricious." The Board recognizes that in "many situations" reinstatement or re-employment after discharge for illegal acts would not be proper, but the Board insists that it was proper in this instance. For the reasons we have given we disagree with that view. We think that a clearer case could hardly be presented and that, whatever discretion may be deemed to be committed to the Board, its limits were transcended by the order under review.

The Board stresses the fact that, when respondent was able to obtain possession of its buildings and to resume operations, it offered re-employment to many of the men who had participated in the strike. The contention confuses what an employer may voluntarily and legally do in the exercise of his right of selection and what the Board is entitled to compel. In announcing the reopening respondent stated its belief that a large number of men who had taken part in the seizure of the plant were compelled to do so through coercion and intimidation and that applications for re-employment from such men would receive favorable consideration. The Board challenges the statement that respondent limited its rehiring to such applicants. The Board points to evidence showing that everyone who applied for re-employment during the period of restaffing was taken back without condition except two employees who were advanced in years and were not reinstated solely for that reason, and to the testimony of the superintendent that at least thirty-seven were rehired "who had been in the sit-down."

We find it unnecessary to consider in detail the respective contentions as to respondent's offer of re-employment, for we think that its action did not alter the unlawful character of the strike or respondent's rights in that aspect. The important point is that respondent stood ab-

solved by the conduct of those engaged in the "sit-down" from any duty to re-employ them, but respondent was nevertheless free to consider the exigencies of its business and to offer re-employment if it chose. In so doing it was simply exercising its normal right to select its employees.

Fourth.—The requirement of reinstatement of employees who aided and abetted those who seized and held the buildings. There is a group of fourteen persons in this class who were not within the buildings and hence do not appear to have been within the announcement of discharge but who went on strike and fall within the order for reinstatement. The Board made no separate findings with respect to these particular persons and refers us to the evidence to show their relation to the transactions under review. This, however, sufficiently appears in the stipulation of facts, to which the Board was a party, naming in paragraph 12 these fourteen persons and describing their conduct as follows:

"All of the following men were employees of the company on February 17, 1937, but did not participate in the seizure and retention of the building, but aided and abetted the men within the said buildings 3 and 5 in the retention of the said buildings by soliciting, procuring and delivering of food, bedding, cigarettes, stoves, or other supplies, or in some other manner, and thereby assisted the said men in buildings 3 and 5 to remain therein contrary to the injunctive order and writ of injunction heretofore mentioned; that all of the said men named in this paragraph had actual knowledge of the issuance of the said injunctive order and writ of injunction ordering and directing the men in buildings 3 and 5 to vacate the same, and that their activities in aiding and abetting the men in buildings 3 and 5 were done with a view to and for the purpose of assisting the said men to remain in the said buildings after the issuance of the said injunctive order and writ of injunction and with knowledge thereof. None of the men named in this paragraph were discharged by the company on February 17, 1937, or thereafter, and none of these men were recalled to work by the company upon the re-

sumption of plant operations shortly after February 26th, 1937:" (the names follow).

It cannot be said that independently of the Act respondent was bound to reinstate those who had thus aided and abetted the "sit-down" strikers in defying the court's order. If it be assumed that by virtue of Section 2(3) they still had the status of "employees," that provision did not automatically provide reinstatement. Whether the Board could order it must turn on the application of the provision empowering the Board to require "such affirmative action, including reinstatement of employees" as will "effectuate the policies" of the Act. We are thus returned to the question already discussed and we think that in that respect these aiders and abettors, likewise guilty of unlawful conduct, are in no better case than the "sit-down" strikers themselves. We find no ground for concluding that there is any policy of the Act which justifies the Board in ordering reinstatement in such circumstances.

*Fifth.—*There are nine other persons apparently embraced within the order of reinstatement as to which respondent interposes special objections. As to seven, respondent objects to the reinstatement upon the ground that they were inefficient and that no showing of union activity by any of them was made. As to two others, respondent contends that they refused its request to return to work without any conditions and that their places were accordingly filled.

With respect to these nine persons, and to a miscellaneous group of five others including three as to whom the trial examiner recommended dismissal of the complaint, the Board has not supplied specific findings upon the points in controversy to sustain its order.

We are of the opinion that the Circuit Court of Appeals did not err in setting aside the requirement of reinstatement.

Sixth.—The requirement that respondent shall bargain collectively with Lodge

66 of the Amalgamated Association as the exclusive representative of the employees in the described unit.

Respondent resumed work about March 12, 1937. The Board's order was made on March 14, 1938. In view of the change in the situation by reason of the valid discharge of the "sit-down" strikers and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining. The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees the Board has abundant authority to settle the question by requiring an election.

Seventh.—The requirement that respondent shall withdraw all recognition from Rare Metal Workers of America, Local No. 1.

While respondent presents a strong protest, insisting that Local No. 1 of the Rare Metal Workers was the free choice of the employees after work was resumed, we cannot say that there is not substantial evidence that the formation of this organization was brought about through promotion efforts of respondent contrary to the provision of Section 8(2), and we think that the order of the Board in this respect should be sustained. Whether Rare Metal Workers of America, Local No. 1, or any other organization, is the choice of the majority of the employees in the proper unit can be determined by proceedings open to the Board.

The provisions of the Board's order contained in Paragraph 1, subdivisions (a) and (b), in Paragraph 2, subdivision

(d), and in Paragraph 2, subdivisions (e) and (f) so far as these refer to the first-mentioned provisions, and the final Paragraph of the order dismissing the charge under Section 8(3) of the Act, are sustained. The other provisions of the order are set aside.

The judgment of the Circuit Court of Appeals is modified accordingly and as modified is affirmed.

Modified and Affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration and decision of this case.

MR. JUSTICE STONE, concurring in part.

I concur in so much of the Court's decision as holds that the Board was without statutory authority to order reinstatement of those employees who were discharged on February 17, 1937. But I rest this conclusion solely on the construction of §2(3) and §10(c) of the National Labor Relations Act. By §10(c) the Board is given authority to reinstate in their employment only those who are "employees." Before the Board made its order, respondent's employees, by reason of their lawful discharge for cause, had lost their status as such, which would otherwise have been preserved to them under §2(3). . . .

As to the fourteen employees who aided and abetted the sit-down strike, but who were not discharged, I think they retained their status under §2(3), and that the Board had power to reinstate them. Whether that power should be exercised was a matter committed to the Board's discretion, not ours.

In other respects I concur with the decision of the Court.

MR. JUSTICE REED, dissenting in part.

This Court agrees with the conclusion of the Labor Board that the respondent was guilty of unfair labor practices, prior to the strike, in campaigning for a company union, isolating the union president, making, through its superintendent, anti-

union statements and employing a labor spy. It also accepts the Board's conclusion that there was further pre-strike violation by respondent of the Labor Relations Act by refusal to bargain collectively. None questions the power of the Board to reinstate striking employees as a means of redress for unfair labor practices. The issue while important is narrow. Can an employee, on strike or let out by an unfair labor practice, be discharged, finally, by an employer so as to be ineligible for reinstatement under the act?

The issue so stated glows feebly apart from the fire of controversy. But it may permit a more objective appraisal than to examine it when illustrated by conduct on the part of the employees which is thought to put "a premium on resort to force" and to subvert "the principles of law and order which lie at the foundations of society." None on either side of the disputed issue need be suspected of "countenancing lawlessness," or of encouraging employees to resort to "violence in defiance of the law of the land." Disapproval of a sit-down does not logically compel the acceptance of the theory that an employer has the power to bar his striking employee from the protection of the Labor Act.

The Labor Act was enacted in an effort to protect interstate commerce from the interruptions of labor disputes. This object was sought through prohibition of certain practices deemed unfair to labor and the sanctions adopted to enforce the prohibitions included reinstatement of employees. To assure that the status of strikers was not changed from employees to individuals beyond the protection of the act, the term employee was defined to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. . . ." §2(3), Act of July 5, 1935. Without this assurance of the continued protection of the act, the striking employee would be

quickly put beyond the pale of its protection by discharge. As now construed by the Court, the employer may discharge any striker, with or without cause, so long as the discharge is not used to interfere with self-organization or collective bargaining. Friction easily engendered by labor strife may readily give rise to conduct, from nose-thumbing to sabotage, which will give fair occasion for discharge on grounds other than those prohibited by the Labor Act.

The Congress sought by clear language to eliminate this prolific source of ill feeling by the provision just quoted which should be interpreted in accordance with its language as continuing the eligibility of a striker for reinstatement, regardless of conduct by the striker or action by the employer. The constitutional problem involved in such a conclusion is not different from the one involved in compelling an employer to reinstate an employee, discharged for union activity. There is here no protection for unlawful activity. Every punishment which compelled obedience to law still remains in the hands of the peace officers. It is only that the act of ceasing work in a current labor dispute involving unfair labor practices suspends for a period, not now necessary to determine, the right of an employer to terminate the relation. The interference with the normal exercise of the right to discharge extends only to the necessity of protecting the relationship in industrial strife.

The point is made that an employer should not be compelled to re-employ an employee guilty, perhaps, of sabotage. This depends upon circumstances. It is the function of the Board to weigh the charges and countercharges and determine the adjustment most conducive to industrial peace. Courts certainly should not interfere with the normal action of administrative bodies in such circumstances. Here both labor and management had erred grievously in their respective conduct. It cannot be said to be

unreasonable to restore both to their former status. Such restoration would apply to the sit-down strikers and those striking employees who aided and abetted them.

I am of the view that the provisions of the order of the Board ordering an offer of reinstatement to the employees discussed above should be sustained. As the remainder of the order is affected by the determination upon this issue but not wholly controlled by the conclusions, no opinion is expressed as to the other requirements of the order.

MR. JUSTICE BLACK concurs in this dissent.

* * * *

The Supreme Court on the same day (February 27, 1939) refused to review the decision of the Illinois Supreme Court in the *Fansteel* injunction case, the opinion of which is quoted in an earlier chapter.

On the same day the Court decided the *Columbian Enameling* case, quoted from in the previous chapter, that the claim to reinstatement made by the losing strikers had to fail because they could not show that they were out of work because of an unfair practice; they could not show that the company had refused to bargain with the union during the course of the strike.

On the same day the Court held, in *N. L. R. B. v. Sands Mfg. Co.*, quoted from in an earlier chapter, that not only a sit-down strike but also a strike in violation of a

collective agreement was an offense serious enough to nullify the strikers' employee status. This raised the possibility that all sorts of strikes which courts might consider unreasonable either in method or purpose could be put under this special sort of ban; the benefits of the act might be refused to unions with "unclean hands." Pennsylvania's 1937 labor relations act had stated that the benefits of that act were to be denied to unions which discriminated against prospective members because of race, creed, or color; its 1939 revision of that act was to deny the benefits of the law to either an employing company or a union which had been guilty of an unfair labor practice named in the law. Perhaps court interpretation, based indirectly on the custom of equity courts of refusing aid to persons whose hands were unclean, might "amend" the national act in a similar fashion.

The experience of the next two years did not bear out this fear. The Board continued its policy of ordering reinstatement for discriminated-against employees unless they had been convicted on felony charges. Soon afterward it was supported by circuit courts in the *Stackpole Carbon* and *Kiddie Kover* cases, 105 Fed. (2d), respectively p. 167 at p. 175 and p. 179 at p. 183 (1939). A one-day sit-down, ending in ejection by police, was held by the circuit court in the *Stewart Die Casting* case (July 3, 1940, C. C. A.-7) to be grounds for discharge but not automatically to discharge the strikers, and the Supreme Court refused to review the decision (Jan. 13, 1941).

REPUBLIC STEEL CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States. 1940.
311 U. S. 7; 61 Sup. Ct. 77; 85 L. Ed. 1.

MR. CHIEF JUSTICE HUGHES delivered opinion of the Court.

The National Labor Relations Board, finding that the Republic Steel Corporation had engaged in unfair labor practices in violation of Section 8 (1), 8 (2), and 8 (3) of the National Labor Relations Act, ordered the company to desist from these

practices, to withdraw recognition from a labor organization found to be dominated by the company, and to reinstate certain employees, with back pay, found to have been discriminatorily discharged or denied reinstatement. The Board, in providing for back pay, directed the company to deduct from the payments to the

reinstated employees the amounts they had received for work performed upon "work relief projects" and to pay over such amounts to the appropriate governmental agencies. Except for a modification, not now important, the Circuit Court of Appeals directed enforcement of the Board's order. 107 F. (2d) 472.

[We consider only] the question whether the Board had authority to require the company to make the described payments to the agencies of the Government. 310 U. S. 655.

The amounts earned by the employees before reinstatement were directed to be deducted from their back pay manifestly because, having already been received, these amounts were not needed to make the employees whole. That principle would apply whether the employees had earned the amounts in public or private employment. Further, there is no question that the amounts paid by the governmental agencies were for services actually performed. Presumably these agencies, and through them the public, received the benefit of services reasonably worth the amounts paid. There is no finding to the contrary.

The Board urges that the work relief program was designed to meet the exigency of large-scale unemployment produced by the depression; that projects had been selected, not with a single eye to costs or usefulness, but with a view to providing the greatest amount of employment in order to serve the needs of unemployed workers in various communities; in short, that the Work Projects Administration has been conducted as a means of dealing with the relief problem. Hence it is contended that the Board could properly conclude that the unfair labor practices of the company had occasioned losses to the Government financing the work relief projects.

The payments to the Federal, state, county, or other governments concerned are thus conceived as being required for

the purpose of redressing, not an injury to the employees, but an injury to the public—an injury thought to be not the less sustained although here the respective governments have received the benefit of the services performed. So conceived, these required payments are in the nature of penalties imposed by law upon the employer—the Board acting as the legislative agency in providing that sort of sanction by reason of public interest. We need not pause to pursue the application of this theory of the Board's power to a variety of circumstances where community interests might be asserted. The question is—Has Congress conferred the power upon the Board to impose such requirements.

We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

The remedial purposes of the Act are quite clear. It is aimed, as the Act says (Section 1), at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self-organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives. This right of the employees is safeguarded through the authority conferred upon the Board to require the employer to desist from the unfair labor practices described and to leave the employees free to organize and choose their representatives.

They are thus protected from coercion and interference in the formation of labor organizations and from discriminatory discharge. Whether the Act has been violated by the employer—whether there has been an unfair labor practice—is a matter for the Board to determine upon evidence. When it does so determine the Board can require the employer to disestablish organizations created in violation of the Act; it can direct the employer to bargain with those who appear to be the chosen representatives of the employees and it can require that such employees as have been discharged in violation of the Act be reinstated with back pay. All these measures relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole.

As the sole basis for the claim of authority to go further and to demand payments to governments, the Board relies on the language of Section 10 (c) which provides that if upon evidence the Board finds that the person against whom the complaint is lodged has engaged in an unfair labor practice, the Board shall issue an order—"requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict

upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197, 235, 236. . . .

In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

We think that affirmative action to "effectuate the policies of this Act" is action to achieve the remedial objectives which the Act sets forth. Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining-representative of his employees; he may be ordered to cease particular methods of interference, intimidation or coercion to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. These are all remedial measures. To go further and to require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure that they can bargain collectively with the employer through representatives of their own choice. We find no warrant in the policies of the Act

for such an exaction.

In truth, the reasons assigned by the Board for the requirement in question—reasons which relate to the nature and purpose of work relief projects and to the practice and aims of the Works Project Administration—indicate that its order is not directed to the appropriate effectuating of the policies of the National Labor Relations Act, but to the effectuating of a distinct and broader policy with respect to unemployment. The Board has made its requirement in an apparent effort to provide adjustments between private employment and public work relief, and to carry out supposed policies in relation to the latter. That is not the function of the Board. It has not been assigned a role in relation to losses conceived to have been sustained by communities or governments in connection with work relief projects. The function of the Board in this case was to assure to petitioner's employees the right of collective bargaining through their representatives without interference by petitioner and to make good to the employees what they had lost through the discriminatory discharge.

We hold that the additional provision requiring the payments to governmental agencies was beyond the Board's authority, and to that extent the decree below enforcing the Board's order is modified and the cause is remanded with directions to enter a decree enforcing the Board's order with that provision eliminated.

It is so ordered.

MR. JUSTICE ROBERTS took no part in the consideration and decision of this case.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS:

It might fairly be implied by the words "reinstatement of employees with or without back pay" that the employees must themselves be the recipients of the back pay. Were the opinion based on that

ground we would acquiesce. But the judgment here does not rest upon such an interpretation. The holding appears to be on the broad ground that the Board may not require full back pay, even to a wrongfully discharged employee, if he has received pay for services performed on a governmental relief project provided exclusively for the needy unemployed. With this conclusion we cannot agree.

The statute commands that the Board must order "back pay" if the policy of the Act will thereby be effectuated. At least two persons are immediately involved in "back pay," as here used: one who pays and one who receives. The propriety of a "back pay" order as an instrumentality for effectuating the Act's policies, must therefore be determined by the manner in which it influences the payor and payee, one, or both. The central policy of the Act is protection to employees from employer interference, intimidation and coercion in relation to unionization and collective bargaining. We cannot doubt but that a back pay order as applied to the employer will effectually aid in safeguarding these rights. We believe, as did the Board and the court below, that it may well be said that the policies of the Act will be effectuated by denying to an offending employer the opportunity of shifting to government relief agencies the burden of supporting his wrongfully discharged employees. The knowledge that he may be called upon to pay out the wages his employees would have earned but for their wrongful discharge, regardless of any assistance government may have rendered them during their unemployment, might well be a factor in inducing an employer to comply with the Act.

And the construction of the provision for back pay is not helped by labeling the Act's purpose or the Board's action as either "punitive" or "remedial." The "back pay" provision is clear and unambiguous. Hence, it is enough here for

us to determine what Congress meant from what it said.

Nor is there substance to the expressed fear that complete acceptance of the words as Congress wrote them would vest unlimited discretion in the Board, because it would not. That discretion is narrowly limited, by the fact that as to "back pay" the Board can in no instance award any greater sum than "back pay" for the period in which the employee was absent from his employer's services by reason of

his employer's violation of the law.¹

¹ See also *Phelps Dodge Corporation v. N. L. R. B.*, U. S. Supreme Court, April 28, 1941, in which the majority of the Court held that the Board could order a company to offer reinstatement to strikers who had found similar employment elsewhere, if the Board would explain in what way it thought its order would effectuate the policies of the act. The majority also indicated that the Board ought to consider evidence that the applicant for reinstatement had failed to use his best efforts to get a job, and should reduce the amount of back pay due to him correspondingly. See especially the majority's footnote 7, listing some of the Board's practices in awarding back pay.—C.R.

IV. FAVORED LABOR ORGANIZATIONS

If an employing company fosters a company union, this action hampers any other union. If the fostering is secret, employees may join under the impression that the assisted union is free of company influence and will represent their interests militantly. If the fostering is open they are afraid that they will be fired if they do not join. The act looks on aid secured from an employer by a company union in effect as unfair competition. Even if a union is not set up or dominated by the company, it is considered interference for the company to help it, for instance by letting its organizers into the plant while the organizers of a rival union are kept out, or by bargaining with it and it alone before it is clear that it has the support of the majority. Even a union which is apparently supported by a majority may be banned if it has regu-

larly been under company influence. The Board may order a company to "disestablish" a dominated union—that is, to refuse permanently to give it any further recognition. It is sometimes said that the act does not authorize disestablishment, but the Supreme Court has permitted it under an even vaguer statute in the *Texas and New Orleans* case, quoted from in the previous chapter. See the *Pennsylvania Greyhound* and *Newport News* cases, below.¹

¹ See also Stein and others, *Labor Problems in America*, pp. 660-67; and the *Fansteel* case in an earlier section of this chapter, and the *Houde* and *Heinz* cases in a later section. The Board may exclude a dominated union from the ballot in a collective bargaining election. *N. L. R. B. v. The Falk Corporation*, 308 U. S. 453 (1940). See also *International Association of Machinists v. N. L. R. B.*, quoted from in the next section below.—C.R.

NATIONAL LABOR RELATIONS BOARD *v.* PENNSYLVANIA GREYHOUND LINES, INC.

Supreme Court of the United States. 1938.
303 U. S. 261; 58 Sup. Ct. 571; 82 L. Ed. 831.

MR. JUSTICE STONE delivered the opinion of the Court.

The main question for decision is whether, upon a finding that an employer has created and fostered a labor organization of employees and dominated its administration in violation of §8(1), (2) of the National Labor Relations Act . . . , the National Labor Relations Board, in addition to ordering the employer to cease these practices, can re-

quire him to withdraw all recognition of the organization as the representative of his employees and to post notices informing them of such withdrawal.

Respondent Pennsylvania Greyhound Lines, Inc., is a corporation operating a passenger motor bus system between the Atlantic Coast and Chicago and St. Louis. Respondent Greyhound Management Company, an affiliate of the Pennsylvania Company, performs various services re-

lating to employee personnel of the latter and its affiliated corporations. Together, respondents act as employers of those employees working at the Pittsburgh Garage of the Pennsylvania Company and together actively deal with labor relations of those employees.

Upon charges filed by Local Division No. 1063, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, a labor organization, the Board issued its complaint, as permitted by §10 (b) of the Act, charging that respondents had engaged in specified unfair labor practices affecting interstate commerce, in violation of §8. After notice to respondents, and hearing, the Board found that they had engaged in unfair labor practices by interfering with, restraining, and coercing employees in the exercise of their rights, guaranteed by §7, in that they had dominated and interfered with the formation and administration of a labor organization of their employees, Employees Association of the Pennsylvania Greyhound Lines, Inc., and had contributed financial and other support to it in violation of §8 (1), (2).

The Board ordered that respondents cease each of the specified unfair labor practices. It further ordered that they withdraw recognition from the Employees Association as employee representative authorized to deal with respondents concerning grievances, terms of employment, and labor disputes, and that they post conspicuous notices in all the places of business where such employees are engaged, stating that the "Association is so disestablished and that respondents will refrain from any such recognition thereof." 1 N. L. R. B. 1.

Upon the Board's petition under §10 (c) to enforce the order, heard April 1, 1936, the Court of Appeals for the Third Circuit gave judgment after a delay of one year and two months, during which there were three postponements and two rearguments. It struck from the order all

provisions requiring the withdrawal by respondents of recognition of the Employees Association and publication of notice of withdrawal, and directed that in other respects the Board's order be enforced. 91 F. (2d) 178. The court thought that the Board was without authority to order the employers to withhold recognition from the Association, without notice to it and opportunity for a hearing, and without an election by the employees to choose a labor organization to represent them. . . .

The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by §7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 23, 33. This appears both from the formal declaration of policy in §1 of the Act, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, *supra*, 22-24, and from §7, in itself a declaration of the policy which, in conjunction with §10 (c), it adopts as the controlling guide to administrative action.

Before enactment of the National Labor Relations Act this Court had recognized that the maintenance of a "company union," dominated by the employer, may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining. Section 2 (3) of the Railway Labor Act of 1926, had provided that representatives, for the purposes of the Act, should be designated by employer and employees "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." We had held that in enforcing this provision, employer recognition of a company union might be enjoined and the union "disestablished,"

as an appropriate means of preventing interference with the rights secured to employees by the statute. *Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 560; see also *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 542 *et seq.*

Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was "an amplification and further clarification of the principles" of the latter. Report of the House Committee on Labor, H. R. 1147, 74th Cong., 1st Sess., p. 3. It had before it the *Railway Clerks* case which had emphasized the importance of union recognition in securing collective bargaining, Report of the Senate Committee on Education and Labor, S. Rep. 573, 74th Cong., 1st Sess., p. 17, and there were then available data showing that once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other.¹ The National Labor Relations Act continued and amplified the policy of the Railway Labor Act by its declaration in §7, and by providing generally in §8 that any interferences in the exercise of the rights guaranteed by §7 and specifically the domination or interference with the formation or administration of any labor organization were unfair labor practices. To secure to employees the benefits of self-organization and collective bargain-

ing through representatives of the employees' own choosing, the Board was authorized by §10 (c) to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act.

In recommending the adoption of this latter provision the Senate Committee called attention to the decree which, in the *Railway Clerks* case, had compelled the employer to "disestablish its company union as representative of its employees." Report of the Senate Committee on Education and Labor, *supra*. The report of the House Committee on Labor on this feature of the Act, after pointing out that collective bargaining is "a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals," declared: "The orders will of course be adapted to the need of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices." Report of the House Committee on Labor, *supra*, pp. 18, 24.

It is plain that the challenged provisions of the present order are of a kind contemplated by Congress in the enactment of §10 (c) and are within its terms. There remains the question whether the findings adequately support them.

The Board's subsidiary findings of fact fully sustain its conclusion that respondents had engaged in unfair labor practices, by active participation in the organization and administration of the Employees Association, which they dominated throughout its history, and to whose financial support they had contributed; and that they had interfered with, restrained and coerced their employees in the exercise of the rights confirmed by §7 to form for themselves a

¹ On the significance of recognition in collective bargaining see Commons and Andrews, *Principles of Labor Legislation* (Harper and Bros., 4th ed., 1936), p. 372; Catlin, *The Labor Problem* (Harper and Bros., 1935), p. 431, 522; Rufener, *Principles of Economics* (Houghton Mifflin Co., 1927), p. 399; Twentieth Century Fund, Inc., *Labor and the Government* (1935), p. 47; Yoder, *Labor Economics and Labor Problems* (1933), p. 443; U. S. Department of Labor, Bureau of Labor Statistics, *Characteristics of Company Unions*, Bulletin No. 634, Chs. VII, XXII.

labor organization and to bargain collectively through representatives of their own choosing.

It is unnecessary to repeat in full detail the facts disclosed by the findings. They show that before the enactment of the National Labor Relations Act, respondents, whose employees were unorganized, initiated a project for their organization under company domination. In the course of its execution officers or other representatives of respondent were active in promoting the plan, in urging employees to join, in the preparation of the details of organization, including the by-laws, in presiding over organization meetings, and in selecting employee representatives of the organization.

The by-laws and regulations provided that all motorbus operators, maintenance men and clerical employees, after three months service, automatically, became members of the Association, and that only employees were eligible to act as employee representatives. No provisions were made for meetings of members, nor was a procedure established whereby employees might instruct their representatives, or whereby those representatives might disseminate information or reports. Grievances were to be taken up with regional committees with final review by a Joint Reviewing Committee made up of an equal number of regional chairman and of management representatives, but review in those cases could not be secured unless there was a joint submission of the controversy by employee and management representatives.

Change of the by-laws without employer consent was precluded by a provision that amendment should be only on a two-thirds vote of the Joint Reviewing Committee, composed of equal numbers of employer and employee representatives. Employees paid no dues, all the Association expenses being borne by the management.

Although the Association was in terms

created as a bargaining agency for the purpose of "providing adequate representation" for respondents' employees by "securing for them satisfactory adjustment of all controversial matters," it has functioned only to settle individual grievances. On the one recorded occasion when the employees sought a wage increase, the company representatives prevented its consideration by refusing to join in the submission to the Joint Reviewing Committee.

In May, 1935, shortly before the passage of the Act, certain of respondents' Pittsburgh employees organized a local union, Local Division No. 1063 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, and continued to hold meetings of the organization after the passage of the Act on July 5, 1935. Before and after that date, respondents' officers were active in warning employees against joining the union and in threatening them with discharge if they should join and in keeping the union meetings under surveillance.

Section 10 (e) declares that the Board's findings of fact "if supported by evidence, shall be conclusive." Whether the continued recognition of the Employees Association by respondents would in itself be a continuing obstacle to the exercise of the employees' right of self-organization and to bargain collectively through representatives of their own choosing, is an inference of fact to be drawn by the Board from the evidence reviewed in its subsidiary findings. See *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297.

We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under §9 (c), even though it had ordered the employer to cease unfair labor practices. But here

respondents, by unfair labor practices, have succeeded in establishing a company union so organized that it is incapable of functioning as a bargaining representative of employees. With no procedure for meetings of member or for instructing employee representatives, and with no power to bring grievances before the Joint Reviewing Committee without employer consent, the Association could not without amendment of its by-laws be used as a means of the collective bargaining contemplated by §7; and amendment could not be had without the employer's approval.

In view of all the circumstances the Board could have thought that continued recognition of the Association would serve as a means of thwarting the policy of collective bargaining by enabling the employer to induce adherence of employees to the Association in the mistaken belief that it was truly representative and afforded an agency for collective bargaining, and thus to prevent self-organization. The inferences to be drawn were for the Board and not the courts. *Swayne & Hoyt, Ltd. v. United States*, *supra*. There was ample basis for its conclusion that withdrawal of recognition of the Association by respondents, accompanied by suitable publicity, was an appropriate way to give effect to the policy of the Act.

As the order did not run against the

Association it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them. See *General Investment Co. v. Lake Shore & M. S. R. Co.*, 260 U. S. 261, 285-286.

Respondents suggest that the case has become moot by reason of the fact that since the Board made its order it has certified the Brotherhood of Railroad Trainmen as representative of the motor-bus drivers of the Pennsylvania company for purposes of collective bargaining and that in a pending proceeding under §9 (c) for the certification of a representative of the other Pittsburgh employees, to which the Employees' Association is not a party, the Pennsylvania company and Local Division No. 1063, who are parties, have made no objection to the proposed certification. But an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made.

We have considered but find it unnecessary to comment upon other objections to the order, of less moment.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States. 1938.
305 U. S. 197; 59 Sup. Ct. 206; 83 L. Ed. 126.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization, filed a charge, on May 5, 1937, with the National Labor Relations Board that the

Consolidated Edison Company of New York and its affiliated companies were interfering with the right of their employees to form, join or assist labor organizations of their own choosing and were contributing financial and other support, in the manner described, to the International

Brotherhood of Electrical Workers, an affiliate of the American Federation of Labor. The Board issued its complaint and the employing companies, appearing specially, challenged its jurisdiction. On the denial of their request that this question be determined initially, the companies filed answers reserving their jurisdictional objections. After the taking of evidence before a trial examiner, the proceeding was transferred to the Board which on November 10, 1937, made its findings and order.

The order directed the companies to desist from labor practices found to be unfair and in violation of Section 8(1) and (3) of the National Labor Relations Act, directed reinstatement of six discharged employees with back pay, and required the posting of notices to the effect that the companies would cease the described practices and that their employees were free to join or assist any labor organization for the purpose of collective bargaining and would not be subject to discharge or to any discrimination by reason of their choice. 4 N. L. R. B. 71.

It appeared that between May 28, 1937, and June 16, 1937, the companies had entered into agreements with the International Brotherhood of Electrical Workers and its local unions, providing for the recognition of the Brotherhood as the collective bargaining agency for those employees who were its members, and containing various stipulations as to hours, working conditions, wages, etc., and for arbitration in the event of disputes. The Board found that these contracts were executed under such circumstances that they were invalid and required the companies to desist from giving them effect. *Id.* At the same time the Board decided that the companies had not engaged in unfair labor practices within the meaning of Section 8(2) of the Act. That clause makes it an unfair labor practice to "dominate or interfere

with the formation or administration of any labor organization or contribute financial or other support to it." Accordingly the order dismissed the complaint, so far as it alleged a violation of Section 8(2), without prejudice. *Id.*

The companies petitioned the Circuit Court of Appeals to set aside the order and a petition for the same purpose was presented by the Brotherhood and its locals. These labor organizations had not been parties to the proceeding before the Board but intervened in the Court of Appeals as parties aggrieved by the invalidation of their contracts. The Board in turn asked the court to enforce the order. The United Electrical and Radio Workers of America appeared in support of the Board. The court granted the Board's petition, 95 F. 2d 390. We issued writs of certiorari upon applications of the companies (No. 19) and of the Brotherhood and its locals (No. 25).

The questions presented relate (1) to the jurisdiction of the Board; (2) to the fairness of the hearing; (3) to the sufficiency of the evidence to sustain the findings of the Board with respect to coercive practices, discrimination and the discharge of employees; and (4) to the invalidation of the contracts with the Brotherhood and its locals.

The pertinent facts will be considered in connection with our discussion of these questions.

First.—The jurisdiction of the Board.— . . . The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the Circuit Court of Appeals in these words: "Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted

and operated by electric energy, would be greatly impeded. Such effects we cannot regard as indirect and remote." 95 F. 2d 390, 394. . . .

We conclude that the Board had authority to entertain this proceeding against the petitioning companies.

Second.—The fairness of the hearing, —procedural due process. . . .

We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. Section 10(e) (f). Petitioners did not avail themselves of this appropriate procedure. . . .

It cannot be said that the Board did not consider the evidence or the petitioners' brief or failed to make its own findings in the light of that evidence and argument. It would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon. But, aside from the question of the Brotherhood contracts, we find no basis for concluding that the issues and contentions were not clearly defined and that the petitioning companies were not fully advised of them. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350, 351. The points raised as to the lack of procedural due process in this relation cannot be sustained.

Third.—The sufficiency of the evidence to sustain the findings of the Board with respect to coercive practices, discrimination and discharge of employees,—The

companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by "substantial" evidence, merely considered whether the record was "wholly barren of evidence" to support them. We agree that the statute, in providing that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive," means supported by substantial evidence. *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 147. . . .

. . . we are unable to conclude that the Board's findings in relation to the matters now under consideration did not have the requisite foundation. With respect to industrial espionage, the companies say that the employment of "outside investigating agencies" of any sort had been voluntarily discontinued prior to November, 1936, but the Board rightly urges that it was entitled to bar its resumption. Compare *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260. In relation to the other charges of unfair labor practices, the companies point to the statement of Mr. Carlisle at a large meeting of the employees in April, 1937, when the recognition of the Brotherhood was under discussion, that the employees were absolutely free to join any labor organization—that they could do as they pleased. Despite this statement and assuming, as counsel for the companies urges, that where two independent labor organizations seek recognition it cannot be said to be an unfair labor practice for the employer merely to express preference of one organization over the other, by reason of the former's announced policies, in the absence of any attempts at intimidation or coercion, we think that there was still substantial evidence that such attempts were made in this case.

It would serve no useful purpose to lengthen this opinion by detailing the testimony. We are satisfied that the pro-

visions of the order requiring the companies to desist from the discriminating and coercive practices described in subdivisions (a) to (e) inclusive and in subdivision (h) of paragraph one of its order,¹ and to reinstate the six employees mentioned with back pay, and to post notices assuring freedom from discrimination and coercion as provided in paragraph two of the order, rested upon findings sustained by the evidence and that the decree of the Court of Appeals enforcing the order in these respects should be affirmed.

Fourth.—The Brotherhood contracts.—The findings of the Board that the contracts with the Brotherhood and its locals were invalid, and the Board's order requiring the companies to desist from giving effect to these contracts, present questions of major importance. We approach them in the light of three cardinal considerations. One is that the Brotherhood and its locals are labor organizations independently established as affiliates of the American Federation of Labor and are not under the control of the employing companies. So far as there was any charge, under Section 8(2) of the Act, that the

employing companies had dominated or interfered with the formation or administration of any labor organization or had contributed financial or other support to it, the charge was dismissed. Another consideration is that the contracts recognize the right of employees to bargain collectively; they recognize the Brotherhood as the collective bargaining agency for the employees who belong to it, and the Brotherhood agrees for itself and its members not to intimidate or coerce employees into membership in the Brotherhood and not to solicit membership on the time or property of the employers. The third consideration is that the contracts contain important provisions with regard to hours, working conditions, wages, sickness, disability, etc., and also provide against strikes or lockouts and for the adjustment and arbitration of labor disputes, thus constituting insurance against the disruption of the service of the companies to interstate or foreign commerce through an outbreak of industrial strife. It is not contended that these provisions are unreasonable or oppressive but on the contrary it was virtually conceded at the bar that they are fair to both the employers and employees. It also appears from the evidence, which was received without objection, that the Brotherhood and its locals comprised over 30,000, or 80 per cent of the companies' employees out of 38,000 eligible for membership.

The Brotherhood and its locals contend that they were indispensable parties and that in the absence of legal notice to them or their appearance, the Board had no authority to invalidate the contracts. The Board contests this position, invoking our decision in *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261. That case, however, is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in ques-

¹ These provisions of the order in substance require the companies to desist from discouraging membership in the United or encouraging membership in the Brotherhood, or any other labor organization of their employees, by discharges, or threats of discharge, or refusal of reinstatement, because of membership or activity in connection with any such labor organization; from permitting representatives of the Brotherhood to engage in activities in its behalf during working hours or on the employers' property unless similar privileges were granted to the United and all other labor organizations; from permitting employees who were officials of the Employees' Representation Plans to use the employers' time, property and money in behalf of the Brotherhood or any other labor organization; from employing detectives to investigate the activities of their employees in behalf of the United or other labor organizations, or employing for such purpose any other sort of espionage; and from "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations" or to bargain collectively or to engage in concerted activities for that purpose or other mutual aid or protection.

tion and dominated its administration in violation of Section 8(2). The statement that the "Association" so formed and controlled was not entitled to notice and hearing was made in that relation. *Id.*, pp. 262, 270, 271. It has no application to independent labor unions such as those before us. We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. . . .

The Board urges that the National Labor Relations Act does not contain any provision requiring these unions to be made parties; that Section 10(b) authorizes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged. In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed. But the Board contends that the Brotherhood had notice, referring to the service of a copy of the complaint and notice of hearing upon a local union of the Brotherhood on May 12, 1937, and of an amended notice of hearing on May 25, 1937. Petitioners rejoin that the service was not upon a local whose rights were affected but upon one whose members were not employees of the companies' system. The Board says, however, that the Brotherhood, and the locals which were involved, had actual notice and hence were entitled to intervene, Sec. 10(b), and chose not to do so. But neither the original complaint—which antedated the contracts—nor the subsequent amendments contained any mention of them and the Brotherhood and its locals were not put upon notice that the validity of the contracts was under attack. The Board contends that the complaint challenged the legality of the companies' "relations" with the Brotherhood. But what was thus challenged cannot be re-

garded as going beyond the particular practices of the employers and the discharges which the complaint described. In these circumstances it cannot be said that the unions were under a duty to intervene before the Board in order to safeguard their interests.

The Board urges further that the unions have availed themselves of the opportunity to petition for review of the Board's order in the Court of Appeals, and that due process does not require an opportunity to be heard before judgment, if defenses may be presented upon appeal. *York v. Texas*, 137 U. S. 15, 20, 21; *American Surety Company v. Baldwin*, 287 U. S. 156, 168; *Moore Ice Cream Company v. Rose*, 289 U. S. 373, 384. But this rule assumes that the appellate review does afford opportunity to present all available defenses including lack of proper notice to justify the judgment or order complained of. *Id.*

Apart from this question of notice to the unions, both the companies and the unions contend that upon the case made before the Board it had no authority to invalidate the contracts. Both insist that that issue was not actually litigated, and the record supports that contention. The argument to the contrary, that the contracts were necessarily in issue because of the charge of unfair labor practices against the companies, is without substance. Not only did the complaint as amended fail to assail the contracts but it was stated by the attorney for the Board upon the hearing that the complaint was not directed against the Brotherhood; that "no issue of representation (was) involved in this proceeding"; and that the Board took the position that the Brotherhood was "a *bona fide* labor organization" whose legality was not attacked. But the Board says that on July 6th (the last of the contracts having been made on June 16th) the companies amended their answer stating that the making of the contracts had rendered the proceeding moot, and that this neces-

sarily put the contracts in issue. We cannot so regard it. We think that the fair construction of the position thus taken on the last day of the hearings was entirely consistent with the view that the validity of the contracts had not been, and was not, in issue. And the counsel for the companies point to their brief before the Board, which they produce, as proceeding on the basis that the validity of the contracts had not been assailed.

Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of Section 10(c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices "and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence or violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices. Compare *National Labor Relations Board v. Pennsylvania Greyhound Lines*, *supra*. Here, there is no basis for a finding

that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective.

The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brotherhood the collective bargaining agency for those employees who are its members. The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. Section 9(c). Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife.

This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to "affect commerce" in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.

The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency would appropriately extend to the practices of the employers to which the complaint was addressed. See *Jones v. Securities Commission*, 298 U. S. 1, 15. It did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf.

Apart from this, the main contention of the Board is that the contracts were the fruit of the unfair labor practices of the employers; that they were "simply a device to consummate and perpetuate" the companies' illegal conduct and constituted its culmination. But, as we have said, this conclusion is entirely too broad to be sustained. If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge. Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers. The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit mem-

bers and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption. The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice.

We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts. . . .

MR. JUSTICE BUTLER. . . . The Board was without jurisdiction. The facts on which it assumed to exert power need not be narrated; they are sufficiently stated by the lower court and in the opinion here. Both courts rightly treat the case as one where neither employers nor employees are engaged in interstate or foreign commerce.

MR. JUSTICE McREYNOLDS concurs in this opinion.

MR. JUSTICE REED concurring in part, dissenting in part.

While concurring in general with the [majority, above,] I find myself in disagreement with the conclusion that the National Labor Relations Board was "without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order." In that paragraph the petitioner companies are ordered to:

"I. Cease and desist from:

(f) Giving effect to their contracts with the International Brotherhood of Electrical Workers."

It is agreed that the "fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife." This is to be accomplished by contracts with labor organizations, reached through collective bargaining. The labor organizations in turn are to be created through the self-organization of workers, free from interference, restraint or coercion of the employer. The forbidden interference is an unfair labor practice, which the Board, exclusively, is empowered to prevent by such negative and affirmative action as will effectuate the policies of the Act. To interpret the Act to mean that the Board is without power to nullify advantages obtained by the Edison companies through contracts with unions, partly developed by the unlawful interference of the Edison companies with self-organization, is to withdraw from the Board the specific authority granted by the Act to take affirmative action to protect the workers' right of self-organization, the basic privilege guaranteed by the Act. Freedom from employer domination flows from freedom in self-organization.

It is assumed that the terms of these contracts in all respects are consistent with the requirements of the National Labor Relations Act and are in themselves, considered apart from the actions of the Edison companies in securing their execution, advantageous in preserving industrial harmony.

The Board found that the Consolidated Edison Company and its affiliates, the respondents before the Board,

"deliberately embarked upon an unlawful course of conduct, as described above, which enabled them to impose the I. B. E. W. upon their employees as their bargaining representative and at the same time discourage and weaken the United which they opposed. From the outset the respondents contemplated the execution of contracts with the I. B. E. W. locals which

would consummate and perpetuate their plainly illegal course of conduct in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to them under Section 7 of the Act. It is clear that the granting of the contracts to the I. B. E. W. by the respondents was a part of the respondents' unlawful course of conduct and as such constituted an interference with the rights of their employees to self-organization. The contracts were executed under such circumstances that they are invalid, notwithstanding that they are in express terms applicable only to members of the I. B. E. W. locals. If the contracts are susceptible of the construction placed upon them by the respondents, namely, that they were exclusive collective bargaining agreements, then, *a fortiori*, they are invalid."²

The evidence upon which this finding is based is summarized in detail in 4 N. L. R. B., pages 83 to 94. It shows a consistent effort on the part of the officers and foremen of the Edison Company and its affiliates, as well as other employees of the Edison companies—formerly officers in the recently disestablished "Employees' Representation Plans," actually company unions—to further the development of the I. B. E. W. unions by recognition, contracts for bargaining, openly expressed approval, establishment of locals and by permitting solicitation of employees on the time and premises of the Edison companies. By the Wagner Act employees have "the right to self-organization." It is an "unfair labor practice for an employer" to "interfere with, restrain or coerce employees" in the exercise of that right. The Board concluded that the contracts with the I. B. E. W. unions were a part of a systematic violation by the Edison companies of the workers' right to self-organization.

This determination set in motion the authority of the Board to issue an order to cease and desist from the unfair labor practice and to take "such affirmative action . . . as will effectuate the policies of this Act." The evidence was clearly sufficient to support the conclusion of the

² 4 N. L. R. B. 71, 94.

Board that the Edison companies entered into the contracts as an integral part of a plan for coercion of and interference with the self-organization of their employees.

This justified the Board's prohibition against giving effect to the contracts. The "affirmative action" must be connected with the unfair practices but there could be no question as to the materiality of the contracts. As this Court, only recently, said, as to the purpose of the Congress in enacting this Act:

"It had before it the *Railway Clerks* case which had emphasized the importance of union recognition in securing collective bargaining, Report of the Senate Committee on Education and Labor, S. Rep. 573, 74th Cong., 1st Sess., p. 17, and there were then available data showing that once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other."³

To this, it is answered that the extent of the coercion is left to "mere conjecture"; that it would be an "extravagant" assumption to say that none of the 30,000 members "joined voluntarily"; and that the "employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice."⁴ On the question whether or not the Edison companies' activities as to these contracts were a part of a definite plan to interfere with the right of self-organization, these answers are immaterial. It is suggested that the problem of the contracts should be approached with three cardinal considerations in mind: (1) that one contracting party is an "independently established" labor organization, free of domination by the employer; (2) that the contracts grant valuable collective bargaining rights; and (3) that they contain provisions for desirable

working privileges. Such considerations should affect discretion in shaping the proper remedy. They are negligible in determining the power of the Board. They would, if given weight, permit paternalism to be substituted for self-organization. The findings of the Board, based on substantial evidence, are conclusive.⁵ There was evidence of coercion and interference, and the Board did determine that the policies of the Act would be effectuated by requiring the companies to cease giving effect to these contracts.

The petitioners, however, aside from the merits, raise procedural objections. It is contended that before the Board could have authority to order the Edison companies to cease and desist from giving effect to their contracts with the unions, it was necessary that the unions as well as the Edison companies should have legal notice or should appear; that the unions were indispensable parties. This Court has held to the contrary in *Labor Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261. This case determined that where an employer has created and fostered a labor organization of employees, thus interfering with their right to self-organization, the employer can be required without notice to the organization, to withdraw all recognition of such organization as the representative of its employees. It is said that this case "is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of Sec. 8(2)."⁶ In the instant case it was found that no such domination existed. In the *Greyhound* case, the Board found not only domination under Sec. 8(2) but also, as in this case, an unfair labor practice under Sec. 8(1). The company's violation

³ *Labor Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 267.

⁴ [Majority opinion, above.]

⁵ *Washington Coach Co. v. Labor Board*, 301 U. S. 142, 146.

⁶ [Majority opinion, above.]

of Sec. 8(1) was predicated on its interference with self-organization.⁷ In the *Greyhound* case it was said that the organization was not entitled to notice and hearing because "the order did not run against the Association."⁸ Here the unions are affected by the action on the contracts, exactly as the labor organization in the *Greyhound* case was affected by the order to withdraw recognition. It would seem immaterial whether those contracts were violative of one or both or all the prohibited unfair labor practices.

A further procedural objection is found in the failure of the complaint, or any of its amendments, to seek specifically a cease and desist order against continued operation under the contracts. The companies were charged with allowing or organizing meetings on the company time and on company property, permitting solicitation of membership during company time, and paying overtime allowances to those engaged in soliciting or coercing workers to join the contracting unions. The complaint said that similar aid was not extended to a competing union and that office assistance was given to the effort to get members for the contracting unions. These charges made it obvious that the contracts were obtained from the unions which were improperly aided by the Edison companies in violation of the prohi-

bitions against interference with self-organization. Contracts so obtained were necessarily at issue in an examination of the acts in question.

Certainly the Edison companies and the contracting unions could have been allowed on a proper showing a further hearing on the question of the companies continuing recognition of the contracts. By section 10(f) the Edison companies and the unions could obtain a review of the Board's order. In that hearing either or both could show to the court [Sec. 10(e)] that additional evidence as to the contracts was material and that it had not been presented because the aggrieved parties had not understood that the contracts were subject to a cease and desist order or had not known of the proceeding. The court could order the Board to take the additional evidence. This simple practice was not followed. Although all parties were before the lower court on the review, the petitioners chose to rely on the impotency of the Board to enter an order affecting the contracts.

In these circumstances the provision of the order requiring the Edison companies to cease from giving effect to their contracts with the contracting unions is proper. This order prevents the Edison companies from reaping an advantage from those acts of interference found illegal by the Board.

MR. JUSTICE BLACK concurs in this opinion.

⁷ *Labor Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 263.

⁸ *Id.*, 271.

NATIONAL LABOR RELATIONS BOARD *v.* NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY

Supreme Court of the United States. 1939.
308 U. S. 241; 60 Sup. Ct. 203; 84 L. Ed. 219.

MR. JUSTICE ROBERTS delivered the opinion of the Court. . . .

The Board's findings were to the following effect: In 1927, in co-operation with its employees, the respondent put into effect a plan of employee representation

known as "Representation of Employees." The preamble of the plan stated that its purpose was to give employees a voice in respect of the conditions of their labor and to provide a procedure for the prevention and adjustment of future differences.

Under the plan the employees were to elect representatives each of whom was paid \$100 per year for services as such. No one holding a supervisory position was eligible to serve as a representative or to vote for a representative. Administration of the plan was vested in certain joint committees each of which consisted of five elected representatives and not more than five representatives chosen from amongst the employees by the management. There was provision for a Management's Representative whose function was "to keep the management in touch with the representatives and represent the management in negotiations with their officers and committees." A provision calling for the arbitration of differences was to become operative only upon concurrence of the respondent's president.

Amendment of the plan could be made only by the affirmative vote of two-thirds of the full membership of the Joint Committee on Rules or of a majority of all the employees' representatives and all the representatives of the management, at an annual conference. The plan set forth that independence of action of elected representatives was guaranteed by permitting them to take questions of discrimination to any of the superior officers, to the Joint Committee, and to the president of the company. There was no provision for the payment of dues.

The original plan was revised in 1929, 1931, 1934, 1936, and 1937.

By the 1931 revision, which was not materially altered until 1937, a General Joint Committee was set up in lieu of several joint committees theretofore constituted, and two representatives were to be elected by the employees in each department while the respondent was to appoint an equal number of management representatives, a majority of each class of representatives constituting a quorum. The annual remuneration to be paid elected representatives by the company was reduced to \$60.00. The secretary of the General Joint

Committee was paid \$5.00 monthly by the company. An Executive Committee was also established constituted of five elected employe representatives and five representatives of management.

Elections were arranged for by the management representatives but, in so far as possible, were conducted by the employees themselves.

A procedure was established for the adjustment of individual employe grievances, whereby, in event of failure of settlement, notice was to be given to the president of the company. Under the revised plan the General Joint Committee met monthly to take action upon matters presented by the Management Representative or by employe representatives or subcommittees; but finality of the action of the General Joint Committee was dependent upon approval by the respondent's president. Amendment of the plan, which could be accomplished by a two thirds vote of the entire General Joint Committee, became effective when approved by the president of the company.

The last revision made in May, 1937, after the validity of the National Labor Relations Act had been sustained by this court, originated in the General Joint Committee, one-half of whose members represented the interests of the respondent. The amended plan was referred to the Executive Committee, similarly constituted, and to the elected employe representatives, respectively. After announcement by the Management Representative that the revision was acceptable to the respondent it was adopted by the General Joint Committee. The personnel manager, and the general manager of the respondent, took part in the revision of the plan. The secretary of the Committee testified that this revision was undertaken in order to bring the plan within the letter, as well as within the spirit, of the Act.

The two principal changes made were the elimination of payment of compensation by the respondent to elected repre-

sentatives of the employees and the substitution of an Employees' Representative Committee, composed solely of employee representatives elected by employees, for the former General Joint Committee and the Joint Executive Committee. The revised plan provides that action of the Employees' Representative Committee "shall be final and become effective upon agreement by the company"; and, further, that any article of the plan may be amended by a vote of two-thirds of the entire membership of the committee; and "amendments shall be in effect at the time specified by the Employees' Representative Committee, unless disapproved by the company within fifteen days after their passage."

The grievance procedure permits the presentation of a grievance to the respondent's personnel manager, or its general manager, in the event no settlement has theretofore been effected.

Upon the basis of these findings the Board concluded that, from the inception of the plan in 1927 until its final revision in 1937, the respondent dominated, assisted, and interfered with the administration of the labor organization; and that the method followed for amendment of the plan in 1937, and the provisions of the final revision, left the company still in the position of dominating and interfering in the formulation and administration of the plan, contrary to the provisions of Sec. 7 of the Act. The Board held that the Committee is, in the circumstances, incapable of serving the employees as their genuine representative for the purpose of collective bargaining.

The respondent criticizes several of the findings as without support or contrary to uncontradicted evidence. We do not stop to consider these contentions, since, without such findings, there would still be a basis in the record for the Board's conclusions.

The principal contention of the respondent is that the Board ignored un-

contradicted facts and refused to make findings respecting them. The Board replies that it did not ignore these facts, but omitted to find them because they were immaterial to the pivotal issues in the case. It is uncontradicted that labor disputes have repeatedly been settled under the plan; that since 1927 no labor dispute has caused cessation of activities at the respondent's plant; that overwhelming majorities of the employees have participated in the election of representatives; that the company has never objected to its employees joining labor unions; that no discrimination has been practiced against them because of their membership in outside unions; and that neither officials nor superior employees not eligible to vote in the election of employees' representatives, have interfered, or attempted to interfere, or use any influence, in connection with the election of representatives.

Before the Board's decision and order had been promulgated a referendum was held at which a sweeping majority of the company's employees signified, by secret ballot, their satisfaction with the plan as revised in 1937 and their desire for its continuance. Counsel for the Committee requested the Board to certify these facts to the Circuit Court of Appeals as part of the record before the court. The Board, though not bound so to do, embodied these facts in a supplementary certificate. It now takes the position that the only proper way to bring these additional facts to the attention of the review in court would have been by application to the court to remand the cause for further findings, and as this was not done, the certificate was irregular and should not have been considered. We are unable to agree with this contention. We think the Circuit Court of Appeals cannot be convicted of error in accepting the Board's supplemental certificate.

The Board urges that, notwithstanding the facts on which the respondent relies, the structure of the Committee, under the

1937 plan, renders the organization incompetent to meet the requirements of the National Labor Relations Act; and further that, if its fundamental law were free from defect, the history of its organization and administration would require that it be disestablished as the bargaining agency of the employees.

Prior to the adoption of the Wagner Act the plan did not run counter to any federal law, either in conception or administration. The respondent, however, concedes that sundry features of the plan, as then formulated, conflict with the provisions of the statute. Both employer and employees so recognized when they undertook the revision of 1937 for the purpose of bringing the plan within the spirit and the letter of the Act.

The Board has concluded that the provisions embodied in the final revision, whereby action of the Committee requires, for its effectiveness, the agreement of the company, and whereby amendment of the plan can become effective only if the company fails to signify its disapproval within fifteen days of adoption, still give the respondent such power of control that the plan is in the teeth of the expressed policy and the specific prohibitions of the Act. The respondent argues that these provisions affect only the company and not the employees; that, in collective bargaining, there is always reserved to the employer the right to qualify or to reject the propositions advanced by the employees. Whatever may be said of the first mentioned provision, this explanation will not hold for the second. The plan may not be amended if the company disapproves the amendment. Such control of the form and structure of an employee organization deprives the employees of the complete freedom of action guaranteed to them by the Act, and justifies an order such as was here entered. The court below, in its opinion, states it was advised in a brief after the hearing in that court, that the plan had been amended by striking out the

provisions in question. It concludes, therefore, that their previous existence is immaterial. The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record as certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in Section 10(e) of the Act.

But we think that if the record disclosed such an alteration of the plan, the order of the Board could not be held erroneous. The Board held that, where an organization has existed for ten years and has functioned in the way that the Committee has functioned, with a joint control vested in management and men, the effects of the long practice cannot be eliminated and the employees rendered entirely free to act upon their own initiative without the complete disestablishment of the plan. On the record as made we cannot say this was error.

While the men are free to adopt any form of organization and representation whether purely local or connected with a national body, their purpose so to do may be obstructed by the existence and recognition by the management of an old plan or organization the original structure or operation of which was not in accordance with the provisions of the law. Sec. 10(c) was not intended to give the Board power of punishment or retribution for past wrongs or errors. Action under that section must be limited to the effectuation of the policies of the Act. One of these is that the employees shall be free to choose such form of organization as they wish.

As pointed out in *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, disestablishment of a bargaining unit previously dominated by the employer may be the only effective way of wiping the slate clean and affording the employees an opportunity to start afresh in organizing for the adjustment of their relations with the employer. Com-

pare *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 262.

The court below agreed with the respondent that, as the Committee had operated to the apparent satisfaction of the employees; as serious labor disputes had not occurred during its existence; and as the men at an election held under the auspices of the Committee had signified their desire for its continuance, it would be a proper medium and one which the employer might continue to recognize for the adjustment of labor disputes. The difficulty with the position is that the provisions of the statute preclude such a disposition of the case. The law provides that an employee organization shall be free from interference or dominance by the employer. We cannot say that, upon the uncontradicted facts, the Board erred in its conclusion that the purpose of the

law could not be attained without complete disestablishment of the existing organization which had been dominated and controlled to a greater or less extent by the respondent. In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives. It was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force. We think the statute plainly evinces a contrary purpose, and that the Board's conclusions are in accord with that purpose.

The decree must be reversed and the cause remanded for further proceedings in conformity to this opinion.

Reversed.

V. REFUSAL TO BARGAIN

The third general type of interference with union functioning which is forbidden by the act is an employer's refusal to bargain with a union which has the support of a majority of the employees. The employer is not required to concede improved conditions of work, but he must recognize the union, talking with its representatives, and bargain in good faith, making counter-proposals when he rejects the union's demands. He might for instance agree to embody the existing wage-rates and company practices in a collective agreement.

The company must not recognize or make an agreement with a second union in the same unit, unless the second union wins the majority away from the first. The considera-

tions which in 1935 led Congress to adopt this rule, in Section 9 (c) of the act, are seen in the 1934 case of the *Houde Engineering Corporation*, reported just below.

The Board early held that to show its good faith the company must be willing to follow the custom of collective bargaining and reduce the agreement to writing, even though it did no more than state existing practices. See the *Heinz* case, below.¹

¹ On companies' legal duty to bargain (unions' "right to collective bargaining") see also Stein and others, *Labor Problems in America*, pp. 671-75; and the *Columbian* case, reported in the previous chapter.—C.R.

In the Matter of HOUDE ENGINEERING CORPORATION and UNITED AUTOMOBILE WORKERS FEDERAL LABOR UNION NO. 18839

(First) National Labor Relations Board. 1934.

1 N. L. R. B. (old) 35.

The National Labor Board of 1933-34 rendered decisions which interpreted Section 7(a), and its successor, the first National La-

bor Relations Board, appointed under Public Resolution. 44, elaborated this work. Both had to deal with the question whether it was

permissible for a company to deal with several competing unions at once.

* * * *

This case came before the Board upon complaint of the Union that, although it had been chosen as the collective bargaining agency by a majority of the company's employees at an election conducted by the National Labor Board, the company declined to recognize the Union as the collective bargaining agency for all the employees eligible to vote in the election. The company insisted that under Section 7(a) of the Recovery Act it was obligated to bargain collectively not merely with the Union but also with the organization voted for by the minority of employees.

The question at issue is one of statutory interpretation; but it cannot be answered by a mere reading of the language of Section 7(a), much less by abstract arguments about the rights of majorities and minorities. It is necessary to consider first of all the objects of the statute, and then the effect of the company's interpretation upon the achievement of those objects.

The fundamental purpose of Section 7(a) was to encourage collective bargaining, with all that that implies. Employees were to "have the right to organize and bargain collectively," and to be free from interference in self-organization "*for the purpose of collective bargaining.*"

These phrases are full of meaning. The right of employees to bargain collectively implies a duty on the part of the employer to bargain with their representatives. Without this duty to bargain the right to bargain would be sterile; and Congress did not intend the right to be sterile. The National Labor Board in a series of decisions, and the Petroleum Board in one of its most important cases,² have estab-

lished the incontestably sound principle that the employer is obligated by the statute to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement.

Collective bargaining, then, is simply a means to an end. The end is an agreement. And, customarily, such an agreement will have to do with wages, hours and basic working conditions, and will have a fixed duration. The purpose of every such agreement has been to stabilize, for a certain period, the terms of employment, for the protection alike of employer and employee. By contrast, where all that transpires is a demand by employees for better terms and an assent by the employer, but without any understanding as to duration, there has been no collective agreement, because neither side has been bound to anything.

Section 7(a) must be construed in the light of the traditional practices with which it deals, and the traditional meanings of the words which it uses. When it speaks of "collective bargaining" it can only be taken to mean that long-observed process whereby negotiations are conducted for the purpose of arriving at collective agreements governing terms of employment for some specified period. And in prohibiting any interference with this process, it must have intended that the process should be encouraged, and that there was a definite good to be obtained by promoting the stabilization of employment relations through collective agreements.

That this was the intention of Section 7(a) is apparent not only from its language but also from other provisions of the Recovery Act. Thus Section 1 states that it is the policy of Congress, among

(decided June 30, 1934). [Petroleum Labor Policy Board:] *In the Matter of Magnolia Petroleum Co. and International Association of Oil Field, Gas Well and Refinery Workers* (decided February 6, 1934).

² *In the matter of Eagle Rubber Company and United Rubber Workers' Federal Labor Union No. 18683* (decided May 16, 1934); *In the Matter of National Aniline & Chemical Company and Allied Chemical Workers' Local #18705* (decided May 25, 1934); *In the Matter of Connecticut Coke Company and United Coke & Gas Workers' Union, No. 18829*

other things, "to induce and maintain united action of labor and management under adequate governmental sanctions and supervision." And Section 7(b) provides that the President "shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry . . . with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail" (that is, in any business where the right of collective bargaining has not been interfered with) "to establish by mutual agreement the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary . . . to effectuate the policy of this title." It is obvious that these desired standards, and the "united action of labor and management" which Congress contemplated, could scarcely be effected except by collective agreements between employers and representatives of employees, resulting from collective bargaining.

Apart from these specific provisions of the Act, it is evident that, taking the Act as a whole, its objects could not be fully achieved without collective undertakings between employers and the representatives of employees. The fundamental aim of the Act was to restore prosperity by increasing purchasing power. Industry was to be stabilized by permitting employers to combine together, immune, to a large extent, from the restrictions of the anti-trust laws, for the purpose of eliminating cut-throat competition, waste, and the grosser evils of unplanned production. At the same time, hours were to be reduced, wages increased, and re-employment effected on the largest possible scale. These vital readjustments could not be brought about by the law alone. Close and continuing co-operation between management and labor was essential in working out the readjustments and in seeing to it that the gains which industry might derive from its new powers to control production and prices would be equitably

shared with the wage-earners, and thus serve to increase purchasing power. Collective bargaining and the collective agreements resulting therefrom would be an essential part of this process. And in the projected stabilization of industry, based upon the principle of fair competition, it was intended that wages, hours and working conditions should also be stabilized as far as possible, and should be reasonably uniform within each particular industry. In achieving these objects, collective agreements would play an important, if not indispensable, part, since the uniform requirements fixed in the codes were never intended to do more than set a minimum.³

In approaching the issue involved in this case, it is clear that any interpretation of Section 7(a) which in practice would hamper self-organization and the making of collective agreements cannot be sound. The Houde Company insists not merely on its right but on its duty under the statute to bargain separately, and whenever requested, with two groups of its employees, one representing the majority and the other the minority. And the question presented, therefore, is whether or not this interpretation has resulted in practice in defeating the objects of the statute.

The facts may be briefly recounted. The Houde Company is engaged chiefly in the manufacture of certain automobile parts which are shipped in interstate commerce from the company's plant in Buffalo. Its employees are skilled workers, homogeneous in occupation, and the

³ For expression of the fundamental aims of the Act in the hearings and debates of Congress, see *Hearings before Committee on Finance* (U. S. Sen., 73d Cong., 1st Sess.) on S. 1712 and H. R. 5755, pp. 1-3; *Hearings before Committee on Ways and Means* (H. Rep., 73d Cong., 1st Sess.) on H. R. 5664, pp. 80-4, 91-6; *Report of Committee on Ways and Means* (H. Rep., 73d Cong., 1st Sess.) on H. R. 5775, p. 11, quoted in *Report of Committee on Finance* (U. S. Sen., 73d Cong., 1st Sess.) on H. R. 5755, p. 15, Cong. Rec. 73d Cong., 1st Sess., pp. 4294, 4309-10, 4891; Cong. Rec., 73d Cong., 2d Sess., pp. 12197, 12208, 12230.

company concedes that there are no groups of employees which because of their peculiar occupations should be considered as separate units for purposes of collective bargaining.

For several years prior to the advent of the Union last fall, athletic events among the men had been promoted by a loose-knit association, if it can be called such, which consisted simply of a treasurer and a chairman in charge of athletics. The association seems to have had no formal name, no meetings of any sort and no listed members. Small admission fees to the various events were the only source of revenue. In the autumn of 1933 employees began to join the United Automobile Workers Federal Union No. 18839, affiliated with the American Federation of Labor, and within a very short time after this became known a sudden and significant change took place in the so-called athletic association. Forms were circulated in the plant for the nomination of representatives to prepare by-laws for the association. These forms stated in substance that the association, in addition to continuing its athletic activities, would also take up with the management questions of working conditions. A clause to that effect was written into the by-laws, which were prepared by the representatives nominated by the workers. The name of the association became the Houde Welfare and Athletic Association, and it was given a definite structure and form, with members, officers and a grievance committee for the purpose of negotiating with the company.

There is no evidence that these developments, following immediately upon the beginning of unionization, were sponsored by the company, but it is clear from what followed that the company gave to the Association its moral blessing, and looked with favor upon its new activities. For shortly after the Association had been reshaped, a request of the Union representatives for recognition was denied,

while at about the same time a wage increase sponsored by the Association was granted to all employees. The company thereafter refused to treat with the Union representatives, unless they would disclose the Union membership list.

Ultimately, after hearings on the complaint of the Union before the Buffalo Regional Labor Board and the National Labor Board, which the company in each case declined to attend, an election was ordered to be held in the plant on March 23, 1934. Several days beforehand, another general wage increase was granted to the employees as a result of requests by the Association. The election resulted in 1,105 ballots for the Union and 647 for the Association, with about 400 not voting. Thus the Union was established beyond question as the representative of the majority, not merely of those voting, but of all the employees.

There is evidence that two of the principal officers of the Association agreed with the Buffalo Regional Board before the election that if the Association did not receive a majority of the votes it would recognize the Union as the exclusive bargaining agency. In the light of this alleged agreement, the case might be decided on the ground that the Association had lost by the election whatever standing it might have had as a collective bargaining agency; but since the existence of the agreement has been questioned we are not disposed to decide the case upon such a narrow issue.

Since the election, the company's practice has been to meet every week or two on Saturday mornings, first with the Association's committee and then with the Union committee, or vice versa. At these meetings, with one exception to be later noted, matters of secondary importance only have been discussed: toilet facilities, safety measures, lighting and ventilation, coat-racks, slippery stairs, and so on. Each committee brought up one or another of these topics, and sometimes, but not al-

ways, the company would inform one committee of what it had been discussing with the other. Whenever, as a result of any meeting, the company concluded to take some action, a statement would be posted on the bulletin board of what it had arranged to do.

It is apparent that the matters thus discussed were the ordinary every-day details which any employer would normally be glad to discuss with any employee, or group of employees, and which in no sense constitute the recognized subjects of collective bargaining; namely, wages, hours and basic working conditions. The Union presented no proposals of this sort to the company, because the company from the beginning made clear to the Union that no agreement would be entered into with it.

One thing of general importance, however, resulted from the various meetings with the two committees, and it is significant that the matter was not discussed with the Union committee. In the autumn there had been some talk of group insurance, but the proposal was dropped because representatives of the Association said that they thought the time was not ripe. Some two months ago the proposal was renewed and was taken up by the company with the Association's committee. The proposal required a consideration of what the terms of the policy should be, including the amount and division of the premium and the coverage—factors which would affect all of the employees. The Association's committee and the company decided the matter without consulting the Union, and a circular was then distributed to all employees, in which the vice-president and general manager of the company approved the plan, and stated that it was being sponsored by the Association. Nearly all of the employees agreed to take the insurance, and the Association received credit for its part in making the insurance available.

It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the objects of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion and friction between the leaders of the committees. The leader of the Association's committee, who testified at the hearing, evidently enjoyed the prestige of his position and the close contact which it brought him with his superiors. He said that his Association wished to be able to present grievances directly to the company, instead of through the Union, because "maybe" the employees thought that better terms could thus be obtained.

Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks.

But even if the company's policy had not thus resulted in impairing the effectiveness of collective bargaining—and it could hardly have resulted in anything else—it clearly prevented any arrival at collective agreements in the sense intended by the statute. The company's conception of its duty was merely this: that the company should periodically receive each committee, listen to its suggestions, discuss them politely and then act upon them or not, as it might see fit. If that be all that the statute requires, the company was within its rights, but, as has been pointed out, the statute calls for more than that. It was not enacted to promote discussions. Such an anaemic purpose was foreign to the Recovery Act. The statute was enacted to promote the making of collective agreements covering terms of employment for definite periods, as an integral part of the process

of stabilizing industry upon a new and juster basis. The company was frank in admitting that it intended to make no such agreement. Its policies were the logical result of that attitude. They were admirably designed to nullify the purposes of the statute.

The company conceded at the hearing before this Board that if a collective agreement covering terms of employment were to be made, it would necessarily have to apply to all of the workers in the plant. The company's duty was to endeavor in good faith to negotiate and arrive at such an agreement. Obviously in the case of a plant-wide agreement it would be impractical to negotiate it and enter into it with the minority group. The practical course, and the one which we think the statute plainly calls for, would be to negotiate and enter into an agreement (if one could be arrived at) with the majority group, who would best be able to express the desires of the workers.

At the hearing the company suggested the only other possible course, namely that the company might bargain collectively and enter into a collective agreement with a composite committee made up of representatives of the Union and the Association, in proportions corresponding to the votes cast in the election. This suggestion would have the merit of including both the majority and the minority representatives in the negotiations, and would on its face be just and democratic. And where, as in the automobile settlement, the parties had agreed to such a plan, there could be no possible conflict with the statute, which clearly permits the majority to set up any fair plan of representation which they desire.

But there was no such agreement in this case; and the plan suggested by the company, being opposed by the majority, would have hindered true collective bargaining even more effectively than the policies heretofore pursued by the company. Counsel for the company, who was

also its secretary and one of its directors, recognized at the hearing that differences within the ranks of the proposed composite committee might develop, and the possibility was evidently not displeasing to him. The economy would have, he said, "the benefit of their conflicting ideas . . . the benefit of hearing the divergent points of view in arriving at our decision"; and if such divergency developed "we might possibly bring in men who were not on the committee, with the committee present, and find out. . . ."

This vision of an employer dealing with a divided committee and calling in individual employees to assist the company in arriving at a decision is certainly far from what Section 7(a) must have contemplated in guaranteeing the right of collective bargaining. But whether or not the workers' representation by a composite committee would weaken their voice and confuse their counsels in negotiating with the employer, in the end whatever collective agreement might be reached would have to be satisfactory to the majority within the committee. Hence the majority representatives would still control, and the only difference between this and the traditional method of bargaining with the majority alone would be that the suggestions of the minority would be advanced in the presence of the majority. The employer would ordinarily gain nothing from this arrangement if the two groups were united, and if they were not united he would gain only what he has no right to ask for, namely, dissension and rivalry within the ranks of the collective bargaining agency. He could by lawful means ascertain the views of particular employees regarding proposals which were under consideration, but he would have no right to insist that the representatives of the majority should, in the absence of any agreement, advance their proposals only in conjunction with some other group.

We have concluded, therefore, that the

only interpretation of Section 7(a) which can give effect to its purposes is that the representatives of the majority should constitute the exclusive agency for collective bargaining with the employer. This interpretation is neither strained nor novel. Similar interpretations of similar provisions have been made whenever the question has presented itself.

Thus the National War Labor Board, created by President Wilson in the spring of 1918, with Frank P. Walsh and the late William Howard Taft as joint chairmen, promulgated as one of its principles a clause almost identical with Section 7(a), reading as follows: "The right of workers to organize in trade-unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged or interfered with by employers in any manner whatsoever."⁴ In application of this principle the Board in numerous instances recognized the majority rule.⁵ In what was perhaps its most famous case, that involving the employees of certain munitions plants in Bridgeport, the Board worked out a detailed plan of organization for collective bargaining which was expressly based upon the majority rule.⁶ And in a general plan for the election of shop committees in war industries the Board again promulgated the majority rule.⁷

Two years later, by the Transportation Act of 1920, the Railroad Labor Board was created, and the statute provided that all disputes were to be considered in conferences between the carriers and "representatives designated and authorized so

to confer . . . by the employees . . . directly interested in the dispute."⁸ This language is even more general than that of section 7(a), but the Railroad Labor Board, charged with construing and enforcing the statute, in one of its first important cases laid down the majority rule in the following words: "The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances whether in person or by representatives of their own choice."⁹ The Railroad Labor Board consistently applied these principles in its decisions.¹⁰ In two of these cases the majority rule came before the Supreme Court of the United States, which, while it did not pass on the legal rights of the parties under the Board's ruling, stated that the principles laid down by the Board were "just and reasonable."¹¹

Custom was in accord with these precedents. Even employers who set up employee representation plans consistently provided in these plans, according to a recent study by the National Industrial Conference Board, that representatives for collective bargaining should be elected by majority vote.¹² So far as appears, the

⁸ 41 Stat. 456, 469, sec. 301.

⁹ *International Association of Machinists v. Atchison, Topeka & Santa Fe Ry.*, Dec. No. 119, 2 U. S. R. R. Labor Bd. 87, 96.

¹⁰ Dec. No. 173, 2 U. S. R. R. Labor Bd. 171; Dec. No. 174, 2 U. S. R. R. Labor Bd. 173; Dec. No. 218, 2 U. S. R. R. Labor Bd. 207; Dec. No. 220, 2 U. S. R. R. Labor Bd. 216; Dec. No. 3117, 6 U. S. R. R. Labor Bd. 444.

¹¹ *Pennsylvania R. R. v. U. S. Railroad Labor Board*, 261 U. S. 72, 84; *Pennsylvania Federation No. 90 v. Pennsylvania R. R.*, 267 U. S. 203.

¹² *Collective Bargaining through Employee Representation Plans*, National Industrial Conference Board (1933), pp. 31-4.

⁴ *Principles and Rules of Procedure*, National War Labor Board, p. 4.

⁵ See, e. g., Docket Nos. 111, 122, 129, 130, 274, 297, 393, 641.

⁶ Docket No. 132, *Organization and By-laws for Collective Bargaining Committees*, instituted by the National War Labor Board for Bridgeport, Conn.

⁷ See *Report of Secretary of National War Labor Board to the Secretary of Labor for the Twelve Months Ending May 31, 1919*, p. 61. See also plan of election used in *Machinists et al. v. Bethlehem Steel Co.*, Docket No. 22.

majority rule was never questioned until employees who had been shepherded into company unions began, under the protection of Section 7(a), to join outside labor unions and to demand the right to bargain collectively through these unions.

Thereupon a struggle ensued which has not yet run its course. Certain employers who were affected by these new developments, refused at first to deal in any way with the unions unless they would reveal their lists of members. The Houde company, among others, adopted these tactics. The unions, fearing discriminatory discharges, declined, as the Union did in this case, to reveal the names of their members. At this juncture the National Labor Board, which had been created some months before, revived the device of conducting elections by secret ballots, which had been used under somewhat different circumstances by the National War Labor Board, and which afforded a fair method of determining by whom the employees wished to be represented. The elections, however, were frequently blocked by employers who declined to submit their pay rolls or other records by which the identity of the employees and their right to vote could be established. The Houde company, by such methods, prevented an election which had been ordered by the Buffalo Regional Labor Board in December, 1933. In cases where an election was held, and a labor union designated by the majority, some employers still declined to deal with the union, or to do more than negotiate separately with it and with the representatives of the minority (generally a company union)—a procedure which, as in the Houde case, resulted in effectively preventing collective bargaining.

In order to dispose of these questions the President issued an Executive Order on February 1, 1934,¹³ which expressly authorized the National Labor Board to

order and conduct elections, and provided in substance that those who were selected by "at least a majority of the employees voting" should "represent all the employees eligible to participate in such an election for the purpose of collective bargaining." Thus the President in his interpretation of the intent of Section 7(a) followed the precedents already referred to in which the majority rule had been laid down. On March 1, 1934, the National Labor Board followed suit in the Denver Tramway Case¹⁴ in a short opinion from which one member of the Board publicly dissented. It was under the authority of this Executive Order and pursuant to the holding in the Denver case, which was reiterated in the Houde decision of March 8,¹⁵ that the election in the Houde plant finally took place.

Public Resolution No. 44, approved June 19, 1934, for the first time provided a statutory method for conducting elections, in order to determine "by what person or persons or organization" the employees desired to be represented.¹⁶ If the rule were that the employer must deal with each group regardless of its numerical strength, an election would be futile. Congress in expressly providing for elections necessarily rejected plural bargaining, and almost as certainly endorsed majority rule. Senator Walsh, chairman of the Committee on Education and Labor, which had held extensive hearings on the

¹⁴ *In the Matter of the Denver Tramway Corp. and Amalgamated Association of Street and Electric Railway Employees*. Decisions of the National Labor Board (August 1933–March 1934), p. 64.

¹⁵ *In the Matter of Houde Engineering Company and the United Automobile Workers Federal Union #18839*, *ibid.*, p. 87.

¹⁶ "SEC. 2. Any board so established is hereby empowered, when it shall appear in the public interest, to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in Section 7 (a) of said Act and now incorporated herein."

¹³ Executive Order No. 6580.

Wagner Labor Disputes Bill,¹⁷ for which the Resolution was eventually substituted, pointed out to the Senate that under the Resolution "the board may call both groups together and say, 'Stop. We will have an election. We will conduct the election and determine who represents a majority of the employees.'" ¹⁸ And again later: "The provision in the joint resolution providing for elections is most helpful. . . . It will enable somebody with governmental authority, when two groups come claiming to be representative of the workers, to find out which does represent them and to issue an order and compel the employer to recognize them for the purpose of collective bargaining." ¹⁹

While Senator Walsh was not in charge of the Resolution, his statement is quoted because it sets forth so clearly what, from the language of the Resolution, the intention of Congress must have been, namely, that the "person or persons or organization" selected by the majority should represent all in collective bargaining.²⁰

¹⁷ *Hearings before the Committee on Education and Labor* (U. S. Senate, 73d Cong., 2d Sess.) on S. 2926.

¹⁸ Cong. Rec., 73d Cong., 2d Sess. p. 12199.

¹⁹ Cong. Rec., 73d Cong., 2d Sess. p. 12200.

²⁰ Pending before the Senate when the Resolution was being debated, and made law only a few days later, was the revised Railway Labor Act (Public No. 442, 73d Cong., approved June 21, 1934). Herein Congress, dealing for the first time expressly with the question of employee representation, gave to the majority rule in railway labor relations the sanction of statute law:

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be representative of the class or craft for the purposes of this Act Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time."

A modification of this provision that attempted to give minority groups a part in making collective agreements was presented to the Senate Committee on Interstate Commerce by the railroads. It was rejected by the Committee. See *Hearings before Committee on Interstate Commerce* (U. S. Senate, 73d Cong., 2d Sess.) on S. 3266.

The President, in creating the National Steel Labor Relations Board by Executive Order on June 28, 1934, so interpreted the Resolution. His Order, issued under the authority of the Resolution, directed that where elections were held: "The person, persons, or organization certified as the choice of the majority of those voting shall be accepted as the representatives of said employees for the purpose of collective bargaining . . ." ²¹

This Board, therefore, stands upon the majority rule. And it does so the more willingly because the rule is in accord with American traditions of political democracy, which empower representatives elected by the majority of the voters to speak for all the people.

In concluding this opinion the Board wishes to indicate the limits beyond which it does not go. The rule here announced is to be applied, in the language of the Executive Order of June 28 just referred to, "without denying to any employee or groups of employees the right to present grievances, to confer with their employers, or to associate themselves and act for mutual aid or protection."

The rule does not compel employees to join the organization representing the majority. It does not establish a closed shop, nor necessarily lead to a closed shop, that being a matter for negotiation.

This opinion lays down no rule as to what should constitute the proper unit as the basis of representation. The unit may be, as in this case, the plant. In other cases, where there may be two or more separate crafts or other distinct groupings of employees, each such grouping might properly constitute a unit for collective bargaining; and in such event the representatives of the majority of each unit would be the exclusive agency for the negotiation of a collective agreement relating to that unit. The question of the proper unit or units must be left for

²¹ Executive Order No. 6751.

determination according to the circumstances of particular cases as they arise.

Nor does this opinion lay down any rule as to what the employer's duty is where the majority group imposes rules of participation in its membership and government which exclude certain employees whom it purports to represent in collective bargaining, or where, in an election, representatives have been chosen by a mere plurality of the votes cast, or by a majority of the votes cast but by less than a majority of all employees entitled to vote; or where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask this Board for appropriate relief.

Subject to these qualifications, the Board confines itself to holding that when a person, committee or organization has been designated by the majority of employees in a plant or other appropriate unit for collective bargaining, it is the right of the representative so designated to be treated by the employer as the exclusive collective bargaining agency of all employees in the unit, and the employer's duty to make every reasonable effort, when requested, to arrive with this representative at a collective agreement

covering terms of employment of all such employees.

Findings.—The Houde Engineering Corporation has violated Section 7(a) by interfering with the self-organization of its employees, impairing their right of collective bargaining and refusing to bargain collectively within the meaning of that section, in that, first, it negotiated without intending to reach a collective agreement, and, second, it negotiated with the Association after the employees had, by majority vote, designated the Union as their exclusive agency.

Enforcement.—Unless within ten days from the date of this decision the Houde Engineering Corporation notifies the Board in writing that it recognizes the United Automobile Workers Federal Union, No. 18839, as its employees' exclusive agency for collective bargaining, and that, when requested by the Union, it will enter into negotiations with the Union and endeavor in good faith to arrive at a collective agreement covering terms of employment of all employees within the class which was permitted to vote at the election of March 23, 1934, the case will be referred to the National Recovery Administration and to the enforcement agencies of the Federal Government for appropriate action.

H. J. HEINZ COMPANY *v.* NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States. 1941.
311 U. S. —; 61 Sup. Ct. 320; 85 L. Ed. 303.

In this opinion, besides taking up written collective contracts, the Court upheld the Board in its decision that the petitioning company had fostered the Heinz Employees Association in order to keep out an A. F. L. union, at the very least because the company had not told its employees to disregard the anti-union statements being made by supervisory employees; it upheld the Board in its decision that the association should be disestablished, though the employees remained free to form another plant-wide union if they

preferred it to the A. F. L. union which had won a collective-bargaining election at the Heinz plant.

* *

MR. JUSTICE STONE delivered the opinion of the Court. . . .

The Employer's Refusal to Sign a Written Agreement. It is conceded that although petitioner has reached an agreement with the Union concerning wages, hours and working conditions of the em-

ployees, it has nevertheless refused to sign any contract embodying the terms of the agreement. The Board supports its order directing petitioner, on request of the Union, to sign a written contract embodying the terms agreed upon on the ground, among others, that a refusal to sign is a refusal to bargain within the meaning of the Act.

In support of this contention it points to the history of the collective bargaining process, showing that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the Union with which the agreement is reached and as a permanent memorial of its terms.¹ This experience has shown that refusal to sign a written contract has been a not infrequent means of frustrating the bargaining process through the refusal to recognize the labor organization as a party to it and the refusal to provide an authentic record of its terms which could be exhibited to employees, as evidence of the good faith of the employer. Such refusals have proved fruitful sources of dissatisfaction and disagreement.² Contrasted with the unilateral statement by the employer of his labor policy, the signed agreement has been regarded as

the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife.³

Before the enactment of the National Labor Relations Act it had been the settled practice of the administrative agencies dealing with labor relations to treat the signing of a written contract embodying a wage and hour agreement as the final step in the bargaining process.⁴ Congress, in enacting the National Labor Relations Act, had before it the record of this experience, H. Rept. No. 1147, 71st Cong., 1st Sess., p. 5, and see also pp. 3, 7, 15-18, 20-22, 24; S. Rept. No. 573, 74th Cong., 1st Sess., pp. 2, 8, 9, 13, 15, 17. The House Committee recommended the legislation as "an amplification and clarification of the principles enacted into law by the Railway Labor Act and by § 7 (a) of the National Industrial Recovery Act." . . .

We think that Congress, in thus incorporating in the new legislation the collec-

³ Carroll R. Daugherty, *Labor Problems in American Industry* (rev. ed. 1938), pp. 936-937; Mitchell, *Organized Labor*, p. 347; George G. Groat, *An Introduction to the Study of Organized Labor in America* (2d ed. 1926), pp. 337-339, 341, 345, 346; *First Annual Report [of the] National Mediation Board*, pp. 1-2.

⁴ The National Mediation Board administering the Railway Labor Act of 1926, as amended in 1934, 44 Stat. 577, 48 Stat. 926, 1185, interpreted that Act, which imposed a duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions . . .", to require signed contracts. See *First Annual Report [of the] National Mediation Board* (1935), pp. 1-2, 36.

The National Labor Board, created to administer Section 7 (a) of the National Industrial Recovery Act, 48 Stat. 195, held that the duty to bargain collectively imposed by that section included an obligation to embody agreed terms in a signed trade agreement. See *Matter of Harriman Hosiery Mills*, 1 N. L. B. 68; *Matter of Pierson Mfg. Co.*, 1 N. L. B. 53; *Matter of National Aniline & Chemical Co.*, 2 N. L. B. 38; *Matter of Connecticut Coke Co.*, 2 N. L. B. 88. See, also, *Matter of Whittier Mills Co.*, Textile Labor Relations Board, Case No. 34. Its successor, the first National Labor Relations Board, did likewise. See *Matter of Houde Engineering Co.*, 1 N. L. R. B. (old) 35; *Matter of Denver Towel Supply Co.*, 2 N. L. R. B. (old) 221; *Matter of Colt's Patent Fire Arms Co.*, 2 N. L. R. B. (old) 135.

¹ Lewis L. Lorwin, *The American Federation of Labor*, p. 309; Commons and Associates, *History of Labor in the United States*, vol. II, pp. 179-181, 423-424, 480; Perlman and Taft, *History of Labor in the United States*, 1896-1932, vol. IV, pp. 9-10; Paul Mooney, *Collective Bargaining*, pp. 13-14; Twentieth Century Fund, Inc., *Labor and the Government*, p. 339.

Concerning the growth and extent of signed trade agreements, see National Labor Relations Board, Division of Economic Research Bull. No. 4, "Written Trade Agreements in Collective Bargaining," pp. 213-236, 49-209; U. S. Dept. of Labor, Bureau of Labor Statistics, *Five Years of Collective Bargaining*, pp. 5-7; Saposs and Gamm, "Rapid Increase in Contracts," 4 *Labor Relations Reporter* No. 15, p. 6.

² Sumner H. Slichter, *Annals of the American Academy* (March, 1935), pp. 110-120; R. R. R. Brooks, *When Labor Organizes*, p. 224. Cf. *Matter of Inland Steel Co.*, 9 N. L. R. B. 783, 796-797.

tive bargaining requirement of the earlier statutes, included, as a part of it, the signed agreement long recognized under the earlier acts as the final step in the bargaining process. It is true that the National Labor Relations Act, while requiring the employer to bargain collectively, does not compel him to enter into an agreement. But it does not follow, as petitioner argues, that, having reached an agreement, he can refuse to sign it, because he has never agreed to sign one. He may never have agreed to bargain but the statute requires him to do so. To that extent his freedom is restricted in order to secure the legislative objective of collective bargaining as the means of curtailing labor disputes affecting interstate commerce. The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining. A businessman who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to

have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining.

Petitioner's refusal to sign was a refusal to bargain collectively and an unfair labor practice defined by §8 (5). The Board's order requiring petitioner at the request of the Union to sign a written contract embodying agreed terms is authorized by §10 (c). This is the conclusion which has been reached by five of the six courts of appeals which have passed upon the question.⁶

Affirmed.

⁶ *Bethlehem Shipbuilding Corp. v. National Labor Relations Board*, 114 F. (2d) 930 (C. C. A. 1st); *Art Metals Construction Co. v. National Labor Relations Board*, 110 F. (2d) 148 (C. C. A. 2d); *National Labor Relations Board v. Highland Park Mfg. Co.*, 110 F. (2d) 632 (C. C. A. 4th); *Wilson & Co., Inc. v. National Labor Relations Board*, decided December 2, 1940 (C. C. A. 8th); *Continental Oil Co. v. National Labor Relations Board*, 113 F. (2d) 473 (C. C. A. 10th). *Contra*, *Inland Steel Co. v. National Labor Relations Board*, 109 F. (2d) 9 (C. C. A. 7th); *Fort Wayne Corrugated Paper Co. v. National Labor Relations Board*, 111 F. (2d) 869 (C. C. A. 7th).—C.R.

VI. ELECTIONS AND BARGAINING UNITS

When a union tries to organize a non-union shop, employees are afraid to admit that they have joined, the union thinks it unwise to tell how many have joined, and the employer in order to belittle the union is likely to claim that very few have. The union may believe that many employees sympathize with it but are afraid to join or do not want to pay dues. It could put this matter to the test by issuing a strike call addressed to members and non-members alike; but strikes are always a risky business. A solution less risky for the union would be the holding of a secret vote, and this has been done occasionally in the past. It became a well-established institution after 1933, when the National Labor

Board was appointed. If an election is held and the union wins, its prestige is increased considerably. As we have seen, another result is that the employer is legally bound to recognize and treat with the union, and is legally free to sign a closed-shop agreement with the union if the union has enough economic strength to compel him to.

The act does not require the Board to hold an election in every case. In some situations the union clearly appears, on brief examination, to have no majority. In others, the company concedes that the union has a majority. In disputed cases, the Board used sometimes to examine union membership and dues lists to see whether a majority of those on the em-

ployer's payroll were union members of fairly recent standing; sometimes the union got further names by asking employees to let it represent them without their becoming members and paying dues. Since 1939 the Board has stopped using these methods and instead schedules an election in every case in which the union's claim to a majority seems to be plausible.

An employer may well want to know how strong a union is, and whether it is a majority union with which it is his legal duty to bargain. But the union may be uncertain of its strength and may not want to risk the loss of prestige that will come if it loses an election. It may therefore delay asking to have one held, and, if the company urges that employers ought to have the power to ask to have elections held, the union is likely to reply that the company wants to hold the election before the union has had a real chance to organize, in order to cause the union to lose and rob it of prestige.

Having this union argument in mind, the Board ruled that it would not accept employer requests for elections, though the act did not itself distinguish between employers and unions in this connection. Employers were, however, able to get the Board to reverse this ruling in 1939, by making it one of the chief points of criticism of the Board. They played up a small number of cases in which an employer had been "caught between two fires," those of the A. F. L. and C. I. O., each union threatening to picket if the other were recognized. In these situations neither union was confident enough to ask the Board for an election. The employers hoped that, if an election were held, the union which lost would retire from the field, as in fact it usually does. If it did not retire, the company hoped to be able to get an injunction against picketing by the losing union by arguing that the loser was asking it not to recognize the majority union and to recognize instead the minority union—both unfair labor practices. This sort of injunction is not mentioned in the act; it has been treated in Chapter 3 in connection with the case of the two *Fur Workers Unions*.

The plant is the usual unit within which to hold an election to find out whether a union has the support of the majority, but there is often controversy as to whether there

should not be separate elections in different departments, or, in some cases, whether all the plants belonging to one employer should vote together or whether all the employers in one district should be lumped together. The employer (or employers) may demand a larger or a smaller voting unit, depending on what unit is the one in which the union is more likely to be defeated. The union will take the opposite view. Where there are two unions, each will, like the employer, figure what arrangement of units will be most likely to make the opponent lose the election, and will speak up for that. Fairly often this has led A. F. L. unions to ask for *department* or *craft* units, while the C. I. O. asked for *plant-wide* or *industrial* units; but sometimes the shoe has been on the other foot. In the two cases in which the two federations have fought over using the *district* as the unit, it has been the C. I. O. union which has had most of the employers organized and the A. F. L. union which wanted to preserve its contracts with the minority of the employers.¹

The Board tries to decide on the bargaining unit (craft, plant, corporation, district, industry) on the basis of past collective-bargaining practice, technological relation, and the like. In dubious cases it has often applied its "Globe doctrine," which means that the decision whether to lump a particular department in with the rest of the plant is deferred until, after the election, it is seen whether the employees of that department have voted for the same union as the rest of the plant or for a different (craft) union. In the *Chrysler* case, the Board voted (E. S. Smith dissenting) that each Chrysler plant should be a separate bargaining unit; but after the election, the C. I. O. having won in most of the plants, the Board decided that these C. I. O. plants should be considered to be one unit. Its policy is that a larger unit once recognized should not be later broken down into smaller ones.

Decision about these conflicts relating to

¹ One was the case of the Pacific Coast longshoremen, *Shipowners' Association of the Pacific Coast*, 7 N. L. R. B. 1002; the other the case of the anthracite coal mining industry, *Stevens Coal Co.*, 19 N. L. R. B. No. 14 (1940). In *A. F. L. v. N. L. R. B.*, 308 U. S. 401 (1940) the Supreme Court refused to override the Board's decision about the longshoremen.—C.R.

elections has been entrusted by Congress to the N. L. R. B. as an expert, specialized labor tribunal. The courts are expected not to intervene—unless, after an election, a company refuses to bargain and is brought before a circuit court; then the company might perhaps plead that the election was unjust and the courts might listen. More direct attacks on election procedure have been rejected by the courts, in accordance with the statute.²

The Board's refusal to announce that elections will always be held by crafts is the center of the A. F. L.'s attack on the Board as biased in favor of the C. I. O. The attack has been strong enough to make the Board wish that it could refuse to take cases in which the two federations were in conflict over the appropriate unit. The Board has avoided criticism from the A. F. L. in a related situation by refusing, from the very beginning, to hold elections between two rival A. F. L. unions. It said that it was up to the A. F. L. to resolve these jurisdictional conflicts.³

The two cases reported next are ones in which the Board had issued a "final order" to bargain collectively—an order based on a previous decision as to what was the appropriate bargaining unit; and it was open to the courts

to review the justice of the unit decision as well as the justice of the order which followed it. In both cases the Supreme Court decided in favor of the Board. In both cases the problem was bound up with the question whether the company had shown favoritism to one of the labor organizations. In both the favored union complained that the Board refused to hear all its evidence. In the first case the favored union wanted one craft to be treated separately (though it later felt strong enough to ask to have the whole plant taken as the unit); in the other case, the *Pittsburgh Plate Glass* case, the company owned several plants and the favored union wanted one plant to be treated separately.

We have seen that in 1939 the Board, in response to criticism and pressure, changed its rules to permit employers to request collective-bargaining elections; and also, partly as a result of criticisms, decided to make its representation decisions only on the basis of elections. Other concessions to critics were made in 1940, when the Board revised its rules on run-off elections (footnote 2, above) and announced that it would thereafter make labor organizations accused of being dominated or favored by an employer parties to the Board proceedings. Its attitude toward appropriate collective-bargaining units seems also to have been gradually modified; the Board's *Chrysler* decision,⁴ just referred to, was later⁵ characterized by dissenting Board member E. S. Smith as the beginning of a trend in Board decisions toward letting the unit be determined by the desires of the employees in the smallest industrial grouping—in other words, a trend toward using the "Globe doctrine" in every case rather than in doubtful cases only. The Supreme Court's *Pittsburgh Plate Glass* decision, below, indicates that the Court did not compel such a trend in the Board, and, after that decision has been quoted from, we shall note whether or not the Board continued such modifications of its previous practices, in response to continued political pressure.

² See *A. F. L. v. N. L. R. B.*, just cited.

On the same day (Jan. 2, 1940) the Court, in *N. L. R. B. v. International Brotherhood*, 308 U. S. 413, refused to review a run-off election in which the A. F. L.'s International Brotherhood of Electrical Workers had been excluded from the ballot. In the first election the C. I. O. got 1,164 votes, the A. F. L. 1,072, and 570 voted for neither. The Board, apparently assuming that a C. I. O. man would rather have no union than an A. F. L. union, and vice versa, scheduled a run-off to decide whether the men wanted the C. I. O. or no union. Though the A. F. L. Electrical Union lost its appeal to the Supreme Court, it won when the Board soon thereafter stated that in the future it would hold run-offs in such cases between the two unions.

On Jan. 2, 1940, also, the Court held in *N. L. R. B. v. The Falk Corporation*, 308 U. S. 453, that the Board could exclude a company-dominated union from the ballot.—C.R.

³ On elections and bargaining units, including criticism of Board practice, see Stein and others, *Labor Problems in America*, pp. 675-82, 690, 694, 697-98. See also "Proposals to Rewrite the National Labor Relations Act," below.—C.R.

⁴ 13 N. L. R. B. 1303 (1939).—C.R.

⁵ *Libbey-Owens-Ford Glass Co.*, 31 N. L. R. B. No. 38 (1941), dissent.—C.R.

INTERNATIONAL ASSOCIATION OF MACHINISTS *v.* NATIONAL
LABOR RELATIONS BOARD

Supreme Court of the United States. 1940.

311 U.S.—; 61 Sup. Ct. 83; 85 L. Ed. 5.

The Serrick Corporation made a closed-shop agreement with the petitioning A. F. L. union, the International Association of Machinists. The contract covered the toolroom employees only. The Board found that the company had favored the Machinists in order to fight the C. I. O. union, the United Automobile Workers. The Board ordered the toolroom contract abrogated. It held that the plant was the correct bargaining unit; it refused to separate off the toolroom. Since its order to the company to bargain with the U. A. W. was a final order, it could be challenged in the courts on the claim that the Board should not have chosen an industrial unit in preference to a craft unit. The I. A. M. did challenge it.

The I. A. M. later shifted its position and said that it had now organized a majority of the workers in the whole plant and asked the Board to consider designating it as the bargaining agent for the plant; but the Board refused to consider this and continued to require the company to deal with the U. A. W.

MR. JUSTICE DOUGLAS delivered the opinion of the Court. . . .

Abrogation of petitioner's closed-shop contract. The Board found that the closed-shop contract between petitioner and the employer was invalid under §8 (3) of the Act because it had been "assisted" by unfair labor practices of the employer, because petitioner did not represent an uncoerced majority of the toolroom employees at the time the contract was executed, and because for this and other reasons it was not an appropriate bargaining unit. We think there was substantial evidence that petitioner had been assisted by unfair labor practices of the employer and that therefore the Board was justified in refusing to give effect to its closed-shop contract. . . .

Fouts, Shock, Dininger, Bolander, Byroad, and Baker were all employees of the toolroom. Four of these—Fouts, Shock, Byroad, and Bolander—were old and trusted employees. Fouts was "more or less an assistant foreman," having certain employees under him. Shock was in charge of the toolroom during the absence of the foreman. Dininger and Bolander were in charge of the second and third shifts respectively, working at night. Prior to mid-July, 1937, they had been actively engaged on behalf of the company union. When it became apparent at that time that the efforts to build up that union were not successful, Fouts, Shock, Byroad, and Bolander suddenly shifted their support from the company union to petitioner and moved into the forefront in enlisting the support of the employees for petitioner. The general manager told Shock that he would close the plant rather than deal with U. A. W. The superintendent and Shock reported to toolroom employees that the employer would not recognize the C. I. O. The superintendent let it be known that the employer would deal with an A. F. of L. union. At the same time the superintendent also stated to one of the employees that some of the "foremen don't like the C. I. O." and added, with prophetic vision, that there was "going to be quite a layoff around here and these fellows that don't like the C. I. O. are going to lay those fellows off first." During working hours, Byroad conducted a straw vote among the employees and under the direction of Fouts and Shock left the plant to seek out an organizer for petitioner. Fouts solicited among workmen in the toolroom stating that his purpose was to "beat" the U. A. W. For a week preced-

ing August 13, Shock spent much time, as did Byroad, going "from one bench to another soliciting" for petitioner. Baker likewise solicited. Dininger offered an employee a "good rating" if he would join petitioner. Not less than a week before August 13, the personnel director advised two employees to "join the A. F. of L." Byroad spent considerable time during working hours soliciting employees, threatening loss of employment to those who did not sign up with petitioner and representing that he was acting in line with the desires of the toolroom foreman, McCoy. This active solicitation for petitioner was on company time and was made openly in the shop. Much of it was made in the presence of the toolroom foreman, McCoy, who clearly knew what was being done. Yet the freedom allowed solicitors for petitioner was apparently denied solicitors for U. A. W. The plant manager warned some of the latter to check out their time for conference with him on U. A. W. and questioned their right to discuss U. A. W. matters on company property. The inference is justified that U. A. W. solicitors were closely watched, while those acting for petitioner were allowed more leeway.

[The company discharged U. A. W. officials in June 1937. It signed the toolroom contract in August, about two weeks after the I. A. M. began organizing; and two days later it discharged the U. A. W. toolroom employees. The hostility of the company to the U. A. W. fortifies the evidence of favoritism to the I. A. M. Though the company did not perhaps introduce the I. A. M. into the plant, it may well have assisted it in organizing.]

[The I. A. M. states that the "supervisory employees" who aided it were not even foremen, and that therefore the company could not be said to be responsible for their aid.]

The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called

agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*. We are dealing here not with private rights (*Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible. Thus where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates. . . .

By §8 (3) of the Act discrimination upon the basis of union membership constitutes an unfair labor practice unless made because of a valid closed-shop contract. But that section authorizes an order under §10 abrogating such a contract with a labor organization which has been assisted by unfair labor practices. The presence of such practices in this case justified the Board's conclusion that petitioner did not represent an uncoerced majority of the toolroom employees. Secs. 7, 8 (1). This conclusion makes it unnecessary to pass upon the scope of the Board's power to determine the appropriate bargaining unit under §9 (b).

Alleged change in status of petitioner. Petitioner challenges the order directing the employer to bargain exclusively with U. A. W., on the ground that prior to the issuance of the order petitioner had obtained an overwhelming majority of the production employees and had so noti-

fied the Board. Petitioner made no showing at the hearing that a majority of the employees had shifted to it after the employer refused to bargain with U. A. W. Nor did it seek leave from the court below to adduce such additional evidence pursuant to §10 (e). Nevertheless it contends that the Board on receipt of the notification should have ordered an election or at least have made an investigation.

[The Board was within its rights in not doing so. It may use its discretion in deciding "how the effects of prior unfair labor practices may be expunged."]

Sec. 9 of the Act provides adequate machinery for determining in certification proceedings questions of representation after unfair labor practices have been removed as obstacles to the employees' full freedom of choice.

Affirmed.

PITTSBURGH PLATE GLASS COMPANY *v.* NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States. 1941.

—U.S.—; 61 Sup. Ct.—; 85 L. Ed.—.

This matter was brought before the Court by the Company and by the Crystal City Glass Workers Union, which is not affiliated with any other union. The Federation of Flat Glass Workers of the C. I. O. has a majority of all the employees in the Company's flat glass division and also a majority at five of the six plants, which are located in five different states.

The Board in 1938 charged the Company with dominating the recently-formed Union and the Company consented to a decree ordering it to cease domination. The Union was not a party to that case. The Board later took up the representation question, making the Union a party to the proceedings. It decided that the six plants of the company's flat glass division together were an appropriate bargaining unit. 10 N. L. R. B. 1111 (1939). The Company replied that it would not bargain with the Federation with respect to Crystal City. The Board then charged the Company with an unfair labor practice and again ordered it to bargain with the Federation as to all six plants. The Supreme Court can decide whether this order should be endorsed only after deciding whether the Board had power to include Crystal City in the unit.

* * * *

MR. JUSTICE REED delivered the opinion of the Court. . . .

First. [The Board, when deciding on the unit, received evidence on the nature

of the business, the history of collective bargaining by the Company, etc. But the Company and the Union allege that the Board excluded relevant evidence which might have changed the Board's view of what would be "the most efficient collective bargaining unit." Part of the evidence in question related to the Crystal City employees' desire to be represented by the Union. The Court holds that this alleged desire is relevant, along with other criteria, to the problem of deciding on the unit. But the Court rules that the Board did not have to receive new evidence about the desires of the Crystal City employees; it had evidence, given by the Union itself, from the early representation hearing.

[The Court holds that the alleged domination of the Union by the Company is relevant too, but only casually; presumably the Board decides on a unit and then holds an election, excluding from the ballot any organization which it believes to be dominated. The Board might well refuse to hear further evidence on the question of domination, even though the Union had not been a party to the original case, which resulted in a consent decree stating that it was dominated by the Company.]

[The Union complains that the Board refused to receive evidence] that the em-

ployees of the Crystal City plant had distinct interests from employees at the Company's other plants. . . .

. . . A great deal of the [unit] hearing was taken up by [Union] testimony designed to bring out any interests of the Crystal City workers that might be distinct from those of employees at other plants. Thus there was abundant testimony with respect to their racial origins, their agricultural surroundings, their inclination or disinclination to visit cities, their lack of a "union" background, their recreational habits, etc. . . . If the Company . . . desired to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative. . . .

[The Union complains that the Board refused to receive evidence that the history of collective bargaining in the Company separated Crystal City from the other plants, and that the Union had gained in membership. As to these points, the Court finds that the Board might properly say, as it did:]

"Accepting the foregoing offer of proof as correctly stating the facts, nevertheless, in view of the proceedings against the respondent [Company, which led to the consent decree labelling the Crystal City Union dominated], negotiations between the respondent and the Crystal City Union cannot be regarded by the Board as evidence of genuine collective bargaining; nor can the Crystal City Union's membership and representation of employees at the Crystal City plant be considered by the Board as expressing the free choice of the employees at that plant or as establishing the existence of another labor organization, in addition to the [C. I. O.'s] Federation, capable of bargaining collectively with the respondent for the employees there."¹

Second. Petitioners complain that the record contains no evidence to support certain essential findings. One of these is the finding in regard to the history of collective bargaining. . . . The evidence, we conclude, justifies the Board's finding that contracts were signed on a division-

wide basis. Certainly the express exclusion of Crystal City employees in the 1937 contract on the employer's demand shows an endeavor to organize on that basis.

Petitioners find failure of evidence to establish the appropriateness of the division-wide unit. It is true the record shows a substantial degree of local autonomy. Crystal City is a separate industrial unit, not one mechanically integrated into the division. The local superintendent deals with labor grievances, the plant has its own purchasing agent and there is no exchange of employees. On the other hand, labor policies and wages come from the central office in Pittsburgh, there is great similarity in the class of work done. Wages, hours, working conditions, manufacturing processes differ only slightly among the plants. An independent unit at Crystal City, the Board was justified in finding, would frustrate division-wide effort at labor adjustments. It would enable the employer to use the plant there for continuous operation in case of stoppage of labor at the other plants. We are of the view that there was adequate evidence to support the conclusion that the bargaining unit should be division-wide.

Third. Finally petitioners urge that the standards for Board action as to the appropriate unit are inadequate to give a guide to the administrative action and the result is necessarily capricious, arbitrary and an unconstitutional delegation of legislative power. We find adequate standards to guide the Board's decision. While the exact limits of the Board's powers or the precise meaning of the terms have not been fully defined, judicially, we know that they lie within the area covered by the words "employer," "plant," and "craft." The division-wide unit here deemed appropriate is well within these limits. As a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining. Where the policy of

¹ 15 N. L. R. B. at 523.

an act is so definitely and elaborately stated, this requirement acts as a permitted measure of delegated authority.

Affirmed.

MR. JUSTICE STONE [dissents, with the concurrence of the CHIEF JUSTICE and MR. JUSTICE ROBERTS.]

[The Board having rejected the Union's and the Company's offers to show that the Crystal City employees wanted a separate unit, that the Union was not dominated, etc., the Board] reaffirmed its finding in the certification proceeding that the Federation was the appropriate bargaining agency and made its order directing the company to bargain with the Federation.

One member of the Board, Mr. Leiserson, dissented, on the ground that the Board's decision was based upon an assumption that the Crystal City employees were incapable of making a free choice of representatives and that the Board's order imposed on the employees at that plant a representative not of their own choosing without any opportunity to express their own choice of representation, and that it disregarded the history of the bargaining by the Company with the employees at the Crystal City plant and its existing contract with the Federation which excluded the Crystal City plant from its operation. . . .

The present wishes of the employees, their freedom in self-organization from the domination and interference of the employer, their past bargaining relations with the employer, were all admittedly relevant considerations. Even though the Board could have refused to hear the evidence offered as to the wishes of the Crystal City employees and as to the prior bargaining history there, on the ground that, if true, the greater effectiveness of employee bargaining through a division-wide representative and the common interests of the employees in the six plants warranted the selection of the employees

in the six plants as the appropriate unit, it did not attempt to do so. Instead, it rejected the evidence proffered by the Union not on technical or procedural grounds, nor because it thought these circumstances immaterial, or insufficient to change its determination, but on the sole ground that the Union was company dominated and "had ceased to function" by reason of the Board's order directing the Company not to bargain with it. It did this without having found in the present or in either of the earlier proceedings that the Union had ever been dominated or interfered with by the Company, and without having made any order running against the Union or purporting to bind it. The position of the Board thus seems to be that the right of the Crystal City employees to act as a unit, and the right of the Union to represent them in proceedings for ascertaining the appropriate bargaining unit, and in collective bargaining with the employer were forever foreclosed in a proceeding in which they were not represented, to which the Union was not a party, in which no evidence was received or finding made of any unfair labor practice, and which resulted only in an order on consent of the employer which did not purport to control the Crystal City employees or the Union, or determine their rights. . . .

As we are often reminded most of the decisions of the Board involve discretion which is to be exercised by it alone and not the courts. For that reason the only substantial right of the litigant before the Board is, in most cases, the right to invoke the exercise of that discretion upon a full and fair consideration of all the relevant evidence. That right the Board has denied to petitioners in this case by refusing to consider the evidence upon palpably erroneous grounds. We are no more free in this case to pass upon the weight and sufficiency of the evidence, with the details of which, like the Board, we are unacquainted, than in any other

case in which the Board is required to receive and pass upon evidence.

One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion is that it cannot rightly exclude from consideration, facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion. . . .

* * * *

Shortly before the Supreme Court handed down its *Pittsburgh Plate Glass* decision, the new majority of the Board (William Leiserson and Harry Millis, the latter appointed in 1940 to succeed Warren Madden as chairman) decided to change its policy on multi-plant units such as the Board had created in the *Pittsburgh* case. The *Libbey-Owens-Ford*

Glass Company presented a very similar situation in which one of the company's plants had been organized by the A. F. L. and the rest by the C. I. O. The Board said in 1939 that all the plants should be lumped together to form a bargaining unit,¹ but the company refused to recognize the C. I. O. in the one plant organized by the A. F. L. The C. I. O. union asked the Board to find that the company had failed to bargain. This the Board now (1941) refused to do, indicating that it had changed its mind. It ordered an election in the plant instead.²

¹ 10 N. L. R. B. 1470.—C.R.

² 31 N. L. R. B. No. 38. E. S. Smith dissented, saying that the Board ought to name as the bargaining unit in any case "the broadest industrial unit in which self-organization has been effective," in order to equalize bargaining power and promote industrial peace and in order to avoid increasing the splits caused by the A. F. L.—C. I. O. separation.—The Board at the same time was reconsidering the regional bargaining unit of the Pacific Coast longshoremen, objected to by the A. F. L.—C.R.

VII. CRITICISM OF THE N. L. R. A.

Judges and legislators, reflecting a public opinion which has gradually grown used to unions, have given unions more and more legal freedom during the last fifteen years or so, and have even given them some positive legal rights, as we have seen in this chapter. Beginning in 1933 union membership moved upward for some years with business improvement, helped along by a certain amount of government protection under Section 7 (a). The increased strength of the unions brought them more respect but it also brought them more hostility.

Their increased political power is reflected in the passage of the N. L. R. A. in 1935, and, especially in 1936, by the election of some unionists to local offices which influence the conduct of the police. The Senate in 1936 approved an investigation into violations of free speech and of the rights of labor (the LaFollette Committee). Growing union power and a threatened increase in the strike-wave may have influenced the Supreme Court to validate the N. L. R. A. in 1937, but of course another influence was the fact that the threat of the President's Court-reorganization bill made the justices want to appear progressive.

The potential political power of the unions, plus the Court's approval of the N. L. R. A., helped push through, in 1937, several state laws modelled on the N. L. R. A.¹ A number of vacancies occurred on the Supreme Court and President Roosevelt filled them with New Dealers, who were likely to favor unions and collective bargaining.

In 1938 the C. I. O. urged that Congress strengthen the N. L. R. A. by refusing to purchase from violators. This practice had been begun under the N. R. A. and was still being applied, as far as wage and hour regulation went, under the Walsh-Healey Act of 1936. Congress failed to act on the C. I. O.'s suggestion but the matter was re-raised when the defense program began in 1940, and, after much controversy, the principle that N. L. R. A. violators were not to be awarded government contracts was given a sort of endorsement by administrative action.

After holding hearings during 1936-39 on various anti-union tactics of employers, including private-police excesses, strikebreaking, and spying, the LaFollette Committee

¹ See also Stein and others, *Labor Problems in America*, pp. 689-90.—C.R.

in 1939 submitted legislative proposals which undertook to supplement the N. L. R. A. in respect to strikebreaking, etc., namely the Oppressive Labor Practices Bill quoted from below.

On the other hand, the growing hostility to an encroaching union movement found useful slogans in the sit-down strikes of early 1937 and in the civil war between the C. I. O. and the A. F. L. Many anti-leaflet and anti-picketing ordinances were passed. In 1939 several states limited unions by passing amendments to their labor-relations laws or by other legislation,² and an extensive investigation of the N. L. R. B. was made by a spe-

cial House committee.³ President Roosevelt revamped the membership of the Board in 1939-40 to make it more conservative and probably more business-like. The introduction of a large-scale defense program in 1940-41 augured limits on strikes, referred to in the previous chapter.

³ Its final report, relating mostly to alleged biases of N. L. R. B. officials, is U. S. Congress, House of Representatives, Special Committee to Investigate the National Labor Relations Board [the Smith Committee], *National Labor Relations Act*, House Report 3109, 76th Congress, 3d Session (Washington: Government Printing Office, 1941). Part 1, the majority report, includes as Appendix C (pp. 157-65) the 1940 proposals of the committee as modified and passed by the House. Part 2, the minority report, merely states that the minority members intend to issue a reply later in 1941.

² See for instance Michigan's Compulsory Mediation and Investigation Law in the previous chapter.—C.R.

An analysis of the 1940 proposed amendments is given in Stein and others, *Labor Problems in America*, pp. 690-700.—C.R.

OPPRESSIVE LABOR PRACTICES BILL

The LaFollette Committee's civil-rights inquiry¹ led in 1939 to the bill against oppressive labor practices—S. 1970, 76th Congress, 1st session.² The full Committee on Education and Labor approved it, July 24, 1939, in Report No. 901. It was not voted on for nearly a year. When it came up for a vote, the European war had had some effect on politics and the Senate attached a rider (Titles II and III, below). The rider was put in the place of the original Title II, which had provided, as an extension of the Walsh-Healey Act, that no agency of the United States government was to buy goods from any firm or give a loan or subsidy to any firm or government which violated the proposed

law. The Senate passed the bill with the rider substituted for this boycott plan, on May 27, 1940 (76th Congress, 3d session), but the House passed neither part of it.

There was already an anti-strikebreaker law on the federal books—the Byrnes Act, passed in 1936 at the same time that the LaFollette Committee was authorized. It forbade the transportation in interstate commerce of persons who were to be used to intimidate peaceful pickets. In the only case brought under the act—against James Rand, head of Remington-Rand, and Pearl L. Bergoff, "the king of the strikebreakers"—the defendants were acquitted, apparently because the government could not show that the men imported were there in order to intimidate. The Oppressive Labor Practices Bill therefore defined strikebreakers very broadly (see its section 2).

* * *

TITLE I

SECTION 1. (a) The Congress hereby finds that the utilization of labor spies, strikebreakers, strikebreaking agencies, oppressive armed guards, and industrial munitions, (1) violates the right of employees to organize, bargain collectively, and engage in concerted activities for their

¹ See U. S., Congress, Senate, Committee on Education and Labor (subcommittee), "Violations of Free Speech and Rights of Labor," *Senate Report No. 46* (75th Congress), including Part 2, "The Chicago Memorial Day Incident," and Part 3, "Industrial Espionage"; ditto, *Senate Report No. 6* (76th Congress), including Part 1, "Strikebreaking Services," Part 2, "Private Police Systems," Part 3, "Industrial Munitions," and Parts 4-6, "Labor Policies of Employers' Associations" (Washington: Government Printing Office, 1937-39). These reports are based on extensive hearings, published under the same title. See quotations from the reports, in Chapter 1, above.—C.R.

² U. S. Senate, Committee on Education and Labor, *Oppressive Labor Practices Act*: Hearings, before a subcommittee, on H. R. 1970, 76th Congress, 1st session, May and June, 1939 (Washington: Government Printing Office, 1939).—C.R.

mutual aid and protection; (2) causes and provokes acts of violence, breaches of the peace, and destruction of property, affecting commerce; (3) leads to labor disputes burdening and obstructing commerce and the free flow of commerce; (4) obstructs the settlement of labor disputes through negotiation and the orderly procedure of collective bargaining, thereby tending to prolong interruption of the free flow of commerce; (5) burdens and obstructs commerce and the free flow of commerce; and (6) interferes with the United States and its agencies in obtaining goods and services pursuant to contract.

(b) The Congress further finds that the use of the channels and instrumentalities of commerce and of the mails for the transportation of goods produced by employers engaged in the activities above referred to, or for the transportation or furnishing of supplies and services for engaging in such activities, tends to spread and perpetuate such activities and the evils resulting therefrom.

(c) It is hereby declared to be the policy of the United States to eliminate the activities referred to in subsection (a) when such activities affect commerce or are engaged in by employers who are engaged in commerce, in the production of goods for commerce, or in furnishing goods or services to the United States and its agencies pursuant to contract, and to prohibit the use of the channels and instrumentalities of commerce and of the mails for the transportation of goods produced by employers who engage in such activities, and for the transportation or furnishing of supplies and services for engaging in such activities.

DEFINITIONS

SEC. 2. Whenever used in this Act— . . .

(i) The term "industrial munitions" means any bomb, grenade, canister, or shell, designed to be projected or capable

of being projected by explosive or mechanical force, by hand, or otherwise, and containing, or capable of emitting, any tear gas, sickening gas, or nauseating gas; any shotgun having a barrel of less than twenty-five inches in length; or any weapon which shoots or is designed to shoot, automatically or semiautomatically, more than one shot without manual reloading, by a single function of the trigger.

(j) The term "to furnish" includes to sell, lease, rent, lend, or give, and to supply funds for the acquisition of.

(k) The terms "sale" or "sell" each include any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) The term "labor spy" means any person who for any compensation, promise of compensation, or other inducement, and whether done as a separate duty or as an additional duty in connection with other work, engages in industrial espionage, and includes any person engaged, in whole or in part, in the business of hiring, recruiting, enlisting, or inducing any person to engage in industrial espionage, or in preparing or transmitting the report of a labor spy.

(m) The term "industrial espionage" means reporting, securing and reporting, or attempting to secure and report to an employer, directly or indirectly—

(1) information with respect to the plans or activities of any of his employees or any labor organization with reference to self-organization or mutual aid or protection, or with respect to the identity, number, or composition of the membership of any labor organization, or with respect to the affiliation of any of his employees or prospective employees with a labor organization, without the express consent of such employees or prospective employees, or of such labor organization, as the case may be.

(n) The term "strikebreaker" means any person who, during or in anticipa-

tion of a labor dispute, is hired—

(1) to replace any regular employee whose work ceases as a consequence of or in connection with such labor dispute if such person receives or is offered a wage, salary, or other compensation from any source (including transportation to the place of employment, board, lodgings, or other facilities) at a rate in excess of the rate received by or offered in good faith to such regular employee immediately prior to the cessation of his work.

(o) The term "strikebreaking agency" means any person engaged, directly or indirectly, in whole or in part, in the business of hiring, recruiting, enlisting, or inducing any person to act as a strikebreaker or labor spy, or in preparing or transmitting the report of a labor spy. . . .

OPPRESSIVE LABOR PRACTICES

SEC. 3. (a) For the purposes of this Act, it shall be an oppressive labor practice for any person in any State—

(1) To employ or utilize any labor spy;

(2) To employ or utilize any strikebreaker or strikebreaking agency;

(3) To pay or agree to pay any compensation or gratuity, directly, or indirectly, to, or to make any contracts or payments for the services of, any person who (A) with the authority, knowledge, or consent of his employer, acts as a private guard or peace officer while armed and while absent from the premises or place of business of his employer (except when such person is engaged in the immediate pursuit of an individual committing a crime on such premises), whether or not such person holds a commission from any State or political subdivision thereof: *Provided*, That it shall not be an oppressive labor practice to employ armed private guards or peace officers to the extent reasonably necessary for the protection of persons and property on the premises of the employer or for the pursuit and arrest of persons committing crimes on such property and for protec-

tion against theft of goods or money in transit; or (B) acts as a private guard or peace officer during, or in anticipation of, a labor dispute when his employer knows or has reason to know that he has been convicted, under the laws of the United States or of any State, of a crime of homicide or assault with a deadly or dangerous weapon.

(4) (A) To possess industrial munitions in or about any place of employment in or about which goods are being produced for commerce, or for any person engaged in a labor dispute to furnish, directly or indirectly, industrial munitions to any person or to any law enforcement officer or agency of any State or political subdivision thereof. *Provided*, That the possession, sale, or disposition of industrial munitions in the regular course of business by any manufacturer or importer thereof, or dealer therein, shall not be deemed to be an oppressive labor practice: *And provided further*, That the possession of industrial munitions by banking institutions or trust companies shall not be deemed to be an oppressive labor practice; or (B) to utilize industrial munitions in connection with any labor dispute, or to possess industrial munitions for the purpose of utilizing them in connection with any labor dispute;

(b) For the purposes of paragraph (3) (A) of subsection (a), proof that any person paid or agreed to pay any compensation or gratuity, directly or indirectly, to, or made a contract or payment for the services of, any person who, during the period covered by such contract, agreement, or payment or who within one hundred and twenty days before or after any such agreement, contract, or payment, acted as a private guard or peace officer while armed and while absent from the premises or place of business of his employer, shall be prima facie evidence that his employer authorized, had knowledge of, or consented to such action.

PROHIBITED ACTS

SEC. 4. It shall be unlawful for any person, after the expiration of ninety days from the date of the enactment of this Act—

(a) To engage in any oppressive labor practice in or about any place of employment in or about which goods are being produced for commerce; . . .

PENALTIES

SEC. 6. Any person who violates any of the provisions of section 4 or 5 shall upon conviction thereof be subject to a fine of not more than \$10,000 or to imprisonment for not more than six months, or both. . . .

SEC. 10. No provision of this title, and no investigation, prosecution, or suit instituted under this title, shall in any manner affect any of the powers or duties of the National Labor Relations Board under the National Labor Relations Act (49 Stat. 449).

TITLE II

SEC. 201. (a) After the date of enactment of this Act, it shall be unlawful for any person engaged in interstate or foreign commerce, or in the production of goods for such commerce, to have any aliens in his employ to the extent of more than 10 per centum of the total number of his employees: *Provided*, That citizens willing and qualified to do such work or perform such services are available for

such employment in or near the locality where such work is to be done; and of any aliens so employed preference shall be given to aliens who have declared their intention to become citizens of the United States, and not more than 10 per centum of the total amounts paid by such person to all his employees shall be paid, directly or indirectly, as expenses or salaries to the aliens employed by him. For the purposes of this section, the term "person" includes an individual, partnership, association, corporation, or other business enterprise. [Cf. pp. 415-19, below.]

(b) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned not more than five years, or both.

TITLE III

SEC. 301. (a) After the date of enactment of this Act, it shall be unlawful for any person engaged in interstate or foreign commerce, or in the production of goods for such commerce, to have in his employ any Communist or member of any Nazi Bund organization. For the purpose of this section, the term "person" includes an individual, partnership, association, corporation or other business enterprise.

(b) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned not more than five years, or both.

PROPOSALS TO REWRITE THE NATIONAL LABOR RELATIONS ACT ¹

One of the more moderate proposals to amend the N. L. R. A. by putting legal duties on unions as well as on employers was that of a committee of the Chamber of Com-

merce of the United States, which is quoted from here.²

¹ See also Stein and others, *Labor Problems in America*, pp. 690-700.

² *Legislation Relating to Labor Disputes*, Report of Department of Manufacture Committee, March 1938 (Washington: Chamber of Commerce of the United States, 1938), pp. 3-9. This report was sub-

mitted to members for their information and for possible later action by the chamber. A similar report a year later recommended guaranteeing the right of freedom of speech between employers and employees and restricting the Board to the determination of facts, transferring its judicial functions to the federal courts or some other appropriate agency. —C.R.

After it there is printed part of a bill favored both by business elements and by the A. F. L.

* * * *

GENERAL PRINCIPLES

If the Labor Relations Act is to operate in the public interest it is essential, in our judgment, that its provisions adhere to the following principles:

1. To the extent that it is feasible for the federal government to protect employees against interference in the exercise of the right to self-organization, such protection should extend to practices engaged in not only by employers but by employees and others.
2. Legislative restrictions affecting employer-employee relations should be so clearly and definitely set forth in the statute as to enable all parties concerned to understand their rights and obligations.
3. These restrictions should apply only to practices that are properly subject to federal regulation.
4. All provisions of the Act should be so formulated as to assure impartiality of administration as between employers and employees and as between particular kinds of labor organizations.

We have taken into account these principles and other relevant factors in reviewing a number of proposals for amendments to the Labor Relations Act that have already been advanced, as well as proposals for other federal labor legislation. Our conclusions respecting the more important of these proposals are here set forth.

AMENDMENTS TO LABOR RELATIONS ACT MERITING SUPPORT

In its present form the Labor Relations Act expressly prohibits employers subject thereto from engaging in any of five separate kinds of action designated as "unfair labor practices." Of these, four relate to conduct which could be engaged in only by employers,—i. e.—they deal entirely with the employer's part in the employer-employee relationship. Specifically, these make it an unfair labor practice for an employer to dominate, interfere with, or

to contribute financial or other support to a labor organization (Section 8(2)); to encourage or discourage membership in any labor organization by discrimination in regard to hire, tenure, or any term or condition of employment (Section 8(3)); to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act (Section 8(4)); and, to refuse to bargain collectively with representatives of a majority of employees in an appropriate unit (Section 8(5)).

The other specified unfair labor practice, Section 8(1), is of an entirely different nature. This prohibits employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7. Section 7 reads as follows:

"Employees shall have the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

If Section 8(1) is to be retained in the Act at all, we believe it should be amended so as to apply not only to employers but to employees and their organizations as well.

Likewise, if there are to continue to be prohibitions against conduct by employers that is held to have the effect of interfering with inherent rights of employees, we believe that there should be express prohibitions against additional practices, whether engaged in by employers or others, that interfere with the rights of either employers or employees.

Unfair Labor Practices

Accordingly, if the Act is to be continued in operation, we believe that Congress should consider amendments that would define as unfair labor practices and that would make it unlawful for any person or group:

1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under the Act, or to induce or compel, or attempt to induce or attempt to compel any employee to become a member of any labor organization by means of any threat, intimidation, or coercion, or by the use of physical violence.
2. To interfere, in connection with any labor dispute, with the free exercise by any person of any right or privilege secured to him by the Constitution or laws of the United States, or of any state, or to damage or destroy the property of any person or to interfere with the exercise of any person's rights in real or personal property.
3. To engage in a sympathetic strike or in a strike for the purpose of inducing or forcing any person or organization to violate any labor agreement or contract or any law of a state or of the United States.
4. To transport or cause to be transported across state lines any person for the purpose of preventing employees from continuing at work or coercing or intimidating them to participate in a strike.

Majority Rule

The present provisions of the Act respecting majority rule do not, in our judgment, provide adequate protection against encroachment by majorities upon the rights of individuals. For example, the Act sanctions closed-shop agreements when entered into with a labor organization representing the majority of the employees in the appropriate unit, provided that such an organization has not been illegally established, maintained, or assisted by an employer. Moreover, these provisions have been construed by the Board as enabling it to prevent an employer from entering into an agreement with a labor organization to recognize it as the bargaining representative of its own members only. The majority rule requirement, furthermore, actually operates to prevent large numbers of employees from being represented by labor organizations of their own selection.

In another respect, the provisions of the statute dealing with majority rule have operated disadvantageously. Employers

are now given no opportunity to take the initiative to bring about Board determination of the accredited representatives of their employees. There is nothing in the Act itself that would prevent the Board from making such determination upon the request of an employer. But the Board's rules and regulations confine this right to employees and to persons or labor organizations acting on the behalf of employees. The inability of an employer to ask for and obtain Board certification of the labor organization entitled to represent his employees may place him in a serious dilemma. When two rival unions are seeking recognition and he is uncertain as to which constitutes a majority, whatever course of action he may take may be construed as violating the law.

As a possible means of remedying such defects in the Act as these, we ask consideration of amendments for the following purposes:

1. To make it explicit that an employer is not obliged to bargain with a labor organization except as the representative of those of his employees who are members of the organization and who have expressly designated it to speak for them in collective negotiations.
2. To make it explicit that an employer is not obliged to continue to bargain collectively with a labor organization when the real issue in controversy is a demand for the check-off or for a closed-shop agreement.
3. To make illegal any action by a majority to deprive a minority of any of its rights, such as through efforts to obtain a closed-shop.
4. To require the Board to receive and consider employers' petitions for investigation as to the membership status of rival labor organizations seeking recognition.⁸

....

INCREASING UNION RESPONSIBILITY

With the view to increasing the responsibility of labor organizations and their members, the enactment of federal or state statutes requiring the incorporation of labor organizations has frequently been suggested. A federal law authorizing

⁸In 1939 the Board ruled that it would do this.
—C.R.

the voluntary incorporation of national labor organizations, enacted some fifty years ago, was repealed in 1932. While it was in effect no labor organization took advantage of its provisions.

In the business world, the corporate device is used as a means of limiting the financial liability of the owners of an enterprise. Such a requirement is not now imposed upon other kinds of organizations, nor, in fact, upon business enterprises. For this reason alone, compulsory incorporation of labor organizations would seem to be undesirable. In so far as incorporation might be advanced as a means of preventing labor organizations from engaging in conspiracies in restraint of trade, it should be remembered that the Supreme Court has held unincorporated labor organizations to be as amenable to the anti-trust laws as any other persons.

While we do not favor compulsory incorporation, it would seem that the advantages of the corporate structure are such as to make it desirable for labor organizations voluntarily to seek incorporation.

Means can be used, without resort to legislation, to bring about a greater degree of responsibility of labor organizations with respect to the fulfillment of their agreements. For example, an employer may properly insist that every labor agreement or contract include provisions for financial or other penalties in the event of violation, or even for the abrogation of the entire agreement if the violations are serious.

There is another kind of accountability on the part of labor organizations that could be reached by legislation. It would seem to be entirely appropriate through state legislation to require labor organizations to be publicly registered and further to require them to file financial reports for the public record.

Furthermore, to prevent irresponsible use of the funds of labor organizations in

connection with political campaigns, we believe that contributions for political purposes should not be permitted on the part of labor organizations.

We therefore recommend that:

1. Federal or state statutes to compel incorporation of labor organizations should not be enacted.
2. There should be state legislation to require all organizations of employees negotiating labor agreements to be publicly registered and requiring such organizations to file periodic reports for public record showing all receipts by their sources and all expenditures by their objects.
3. There should be federal and state statutes to prohibit labor organizations from making contributions for political purposes.

One of the more moderate bills introduced to limit the N. L. R. A. was S. 1000.⁴ It was introduced with the support of the A. F. L., which was especially anxious to have craft-unit elections and to preserve its contracts from attack by the Board such as was seen in the *Consolidated Edison* case, above. Extracts from this "Walsh bill" are printed here.

Section 8 of the National Labor Relations Act is amended by repealing subsections 1 to 5, inclusive, and substituting therefor the following:

"SEC. 8 UNFAIR LABOR PRACTICES.—It shall be an unfair labor practice for an employer:

"(a) To discriminate in regard to hire or tenure or any term or condition of employment (1) in order to prevent or hinder the exercise of any right created or affirmed by this Act, or (2) because an employee has filed charges, given testimony or aided in the initiation or prosecution of any proceeding or inquiry under this Act: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with an or-

⁴ 76th Congress, 1st session; introduced January 25, 1939.

ganization which is not a company union which requires as a condition of employment membership therein, if such organization is a labor organization as defined in section 2 (5) and is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

"(b) To refuse to bargain collectively with the representative designated by a majority of the employees in an appropriate collective bargaining unit, as exclusive representative of all the employees in such unit, provided that nothing in this Act shall prevent a labor organization or any representative designated by less than a majority of employees in a unit appropriate for collective bargaining from exercising any right created or affirmed by this Act, or from bargaining collectively with an employer, so long as no other labor organization or other representative has been designated by a majority of the employees in such appropriate unit.

"(c) To create, maintain, recognize for the purpose of collective bargaining, or bargain with any company union.

"(d) To support a labor organization by (1) financing it, or (2) compensating anyone for services performed in its behalf, or (3) contributing to it money, services, or materials: *Provided*, That an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

"(e) By any other act to restrain or coerce employees in the exercise of any right created or affirmed by this Act. Nothing in this section or in this Act shall be construed or interpreted to prohibit any expressions of opinion with respect to any matter which may be of interest to employees or the general public, provided that such expressions of opinion are not accompanied by acts of discrimination or threats thereof."

Subsection (b) of section 9 of the Na-

tional Labor Relations Act is amended to read as follows:

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or any other unit: *Provided*, That when a craft exists, composed of one or more employees, then such craft shall constitute a unit appropriate for the purpose of collective bargaining for such employee or employees; a majority of such craft employees may designate a representative for such unit; and: *Provided further*, That an appropriate unit shall not embrace employees of more than one employer. Two or more units may, by voluntary consent, bargain through the same agent or agents with an employer or employers, their agent or agents."

Subsection (c) of section 9 of the National Labor Relations Act is amended to read as follows:

"(c) Whenever it is alleged by a labor organization that there is a question or controversy affecting commerce concerning the representation of employees, the Board shall investigate such question or controversy and certify in writing to all persons entitled thereto the name or names of the representatives that the Board has found to have been designated or selected. Whenever it is alleged by an employee or by an employer or by an employer's representative that there is a question or controversy affecting commerce concerning the representation of employees, the Board may investigate such question or controversy. In any investigation under this subsection, the Board shall provide for an appropriate hearing upon due notice to all known interested parties, either in conjunction with a proceeding under section 10 or otherwise, and may conduct an election by secret

ballot of employees, or utilize any other suitable method to ascertain such representatives (either before or after the aforesaid hearing): *Provided, however,* That the Board shall not have jurisdiction for any purpose whatsoever to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization.⁵

Section 10 (b) of the National Labor Relations Act is amended to read as follows:

"(b) . . . The Board shall not adjudicate respecting any agreement unless due notice has been given to all parties to such agreement and unless such persons have been given a reasonable opportunity to appear and present evidence in the case. The person so complained of, and all other persons required to be served as herein provided, shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. Any labor organization having an interest in the proceedings shall be permitted to intervene and thereupon have all the rights of any other parties to the proceedings.⁶ In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

[Section 10 is amended by adding:]

" . . . Nothing in this Act shall be construed to vest jurisdiction in the Board to make any decision or order which has the effect of impairing or nullifying an agreement between an employer and the representative of any of his employees, unless such agreement either (1) is with

a company union, or (2) requires as a condition of employment membership in a labor organization which, at the date of the execution thereof, is not the exclusive bargaining agent of the employees covered thereby, or (3) which by its terms deprives the representative designated by a majority in an appropriate unit of the right exclusively to bargain for the employees in such unit.

"(c) Change of membership in or of affiliation with or withdrawal from a labor organization shall not impair the rights conferred by this Act on such exclusive bargaining agent until either (1) the term of any written contract made by it with an employer has expired or (2) one year from the date of execution of such a contract (where the contract extends beyond one year) has elapsed, whichever is first reached. Such labor organization shall have an interest in its own right in said contract for said period."

Section 10 (c) of the National Labor Relations Act is . . . amended to read as follows:

. . . The findings of the Board as to the facts, if supported by substantial and credible evidence, shall be conclusive. . . .

Subsection (1) of section (11) of the National Labor Relations Act is amended to read as follows:

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board, or agent or agency thereof, shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. In any such investigation or proceeding any party to such proceeding shall

⁵ It was and is the practice of the Board to leave jurisdictional disputes to the parent body; but the act does not instruct it to do so.—C.R.

⁶ Though the Supreme Court was inclined not to insist on unions and company unions adversely affected by Board orders being parties to the proceedings, the Board in 1940 ruled that it would in the future make them parties.—C.R.

have the right to apply for a subpoena or subpoenas, requiring the attendance of witnesses and the production of any evidence that relates to any matter under investigation or in question, by making written application to the Board, or a member thereof or examiner conducting the investigation or proceeding, setting forth that the testimony or evidence is competent and material. . . .

The National Labor Relations Act is amended by adding a new section 13 which shall read as follows:

"SEC. 13. Examiners and other agents, whose functions are to conduct hearings, shall not be under thirty years of age and shall be selected and assigned with due regard for their impartiality, disinterestedness, judicial temperament, and their knowledge of the rules of evidence. In the conduct of proceedings they shall at all times maintain an impartial, unbiased, and judicial attitude toward the parties, witnesses, and issues involved in any proceedings. If in any proceeding under section 9 and section 10 of this Act, any party thereto shall file with the Board a sworn statement charging that the examiner or other agent designated to conduct the hearing is believed to be biased, or partial, in the proceeding, such examiner shall be disqualified, and another examiner or agent shall be designated to conduct such proceeding. Only two such affidavits shall be permitted to any party. At least seven days preceding any hearing the Board shall notify all parties to a proceeding the name of the examiner or agent designated to conduct such hearing. Such affidavit of

prejudice shall be filed with the regional director of the district in which the proceeding is pending within three days of the receipt of notice by the party of the name of such examiner or agent. The mailing of such notice by registered mail to the regional director within three days of the receipt of such notice shall constitute proper service on the Board."

Section 13 of the National Labor Relations Act is amended by renumbering it section 15 and shall read as follows:

"SEC. 15. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike or engage in other concerted activities, or to deprive any party to a labor dispute of the rights, benefits, and protection contained in the [Norris-LaGuardia federal anti-injunction act, printed in Chapter 1].

* * * *

In December, 1940, the President vetoed the Walter-Logan bill, which would have transferred to the courts much of the discretion which had been entrusted to various federal administrative agencies, including the N. L. R. B. The Senate had failed to pass the bill to amend the N. L. R. A. which the House had approved in June—the bill proposed by the majority of the House special committee to investigate the N. L. R. B. and supported by the A. F. L. Since the President in 1939 and 1940 had replaced two members of the Board, the Board continued the amending of its practices and procedures, some of the results of which we have noted; and the movement to amend the law dropped out of sight.

GOVERNMENT AND THE TERMS OF THE
LABOR CONTRACT

Edited by
Emanuel Stein

INTRODUCTION TO PART TWO

Chapters 1 to 5 have dealt with government policing of industrial disputes and with other problems of collective bargaining. We have seen how the prestige and authority of government may be used to further or to retard labor organization, to add to or subtract from the legally permissible weapons of labor and of employers in their struggles with each other. By lending its strength to unions, government facilitates the attainment of union objectives; by withholding it, or by supporting the employers, government may make these objectives unattainable. But, whether the policies and procedures of government *with respect to collective bargaining* tip the scales one way or the other, the determination of the specific terms of employment is still left to the parties directly involved.

There is another side to governmental intervention in the field of labor; that is, government dictation of limits to the terms of the labor contract. Thus, government may set a minimum for wages or a maximum for hours. When government takes action on specific provisions of the labor contract in an industry in which there is a union, its action narrows the area of collective bargaining. In effect, the government says to the combatants, "You may fix wages as high as you like, but they may not be less than a certain amount." In so ruling, the government prevents the stronger side from reaping the full measure of its victory. Where there is no union, governmental intervention in this field delimits the area of individual bargaining in a similar way. Since virtually all American legislation on wages, hours, etc., has been designed to benefit labor, legislation supplements the work of unions in some sectors of the economy and takes its place in others.

To understand the why and how of this sort of governmental activity, which is often referred to as *protective labor legislation*, it is necessary to consider the position of the worker in our society. His most pressing problems, probably, are insecurity of income (because of accident, disease, unemployment, etc.) and insufficiency of income (failure to get a "living" wage). Workers form unions mainly to improve their conditions in these respects and the history of trade unionism tells the story of the varying degrees in which unions have been successful in attaining these objectives. Both workers and unions have found, however, that labor organization alone is not sufficient in all cases, that some greater power is necessary. They have turned their attention, in consequence, to government. It is not to be supposed, however, that this has been done willingly; for generations, organized labor has preferred to steer clear of government, confident in its ability to succeed by collective bargaining. Thus, up to recent years, unions have opposed legislation on wages and hours for men, on unemployment insurance, etc., though they urged laws regulating the work of women, children, aliens, convicts, and other unorganized groups whose weak bargaining power threatened to undermine union standards. Events, however, such as the great depression which began in 1929, have inexorably pushed unions in the direction of increasing reliance on government. More and more they have come to realize that they could not succeed without the help of government; this is particularly evidenced by the attitude of the A. F. L. during the past decade, when it began to press for governmental limitation on the hours of labor and for social security.

Much of the agitation for labor legislation has come from outside the ranks of labor. Humanitarians have for decades been seriously disturbed by what they regarded as excessively low standards of living, the exploitation by industry of women and children, and the effects of insecurity. Organized into consumers' groups, child labor committees, welfare clubs, associations for labor legislation, and the like, such people undertook active and often successful campaigns for governmental intervention. They argued that the public welfare necessitated the setting of a floor to wages and a ceiling to hours, the prohibition of child labor, and the establishment of a sound system of social security.

A prominent role in labor legislation has also been played by legislators and other public officials who found advocacy of such legislation to be good campaign material, besides possibly expressing their personal convictions.

On the other side of the fence, there have been many powerful groups of employers who have viewed with concern the tendency of government to cover an ever-larger field in labor legislation. They have fought wage and hour regulation and social insurance every step of the way, and, if they have not been successful in preventing such legislation, they have at least been able to postpone action for many years. Considerable assistance was given to the opponents of labor legislation by the judiciary, which often found wage and hour laws, child labor laws, and others, to be unconstitutional because they violated the due process clause or exceeded the federal commerce or taxing power.

Most of the law cases reported in the following chapters involve constitutional questions raised by the judges: e.g., Does a workmen's compensation law deprive employers of their property without due process of law? Does a federal child-labor law exceed the powers of Congress over interstate commerce? May a state levy a payroll tax in order to provide a system of unemployment compensation? In some of the fields, at least, concepts with respect to such matters as the commerce power and the taxing power have been altered to permit that which formerly was forbidden. There has been a long, but ultimately successful, struggle to place wage and hour regulation, for example, on a firm constitutional footing.

The emphasis on constitutional issues must not be taken to mean that matters of interpretation and of administration are not of great importance. Quite the contrary! To some extent, these subjects are dealt with in the other selections and in the editorial comments. However, within the limits of the available space, it has appeared impossible to present enough of interpretation and administration to give an adequate picture, even if other materials were cut drastically, and we have, therefore, chosen to slight these matters in this book.

Chapters 6 to 12 survey the principal fields of labor legislation. In Chapter 6, we consider the limitations on the labor supply: i. e., who may and who may not engage in industry. Chapters 7, 8, and 9 deal with the regulation of wages, hours, and working conditions. The final three chapters are devoted to social security—workmen's compensation, unemployment insurance, and old-age benefits.

CHAPTER SIX

REGULATING THE SUPPLY OF LABOR

A great many laws, state and federal, involve some limitation or restriction of the labor supply; that is, the laws are aimed to keep particular persons or groups out of the labor market. Of such laws, those are most significant which prohibit or regulate the employment of children, of convicts, of aliens, and of unlicensed people in certain occupations. Child-labor laws, prison-labor laws, apprentice laws, alien-employment laws, and licensing statutes have one feature in common—they keep out some people from occupations in which they would otherwise engage. It is from this standpoint of exclusion that we view these laws in this chapter.

In emphasizing the limiting or restricting aspect which characterizes these laws, we must not lose sight of the fact that the motives which have induced legislatures to enact the laws may vary from one type of statute to another. In the case of convict labor, for instance, there can be no question of the virtual unanimity of opinion that useful labor of some kind is necessary in the rehabili-

tation and reform of the prisoners; the objection is to the competition in the open market between the products of prison labor and those of free labor. Laws which are aimed to keep immigrants out of the country or to deny them the opportunity to work after they have entered also emphasize the competitive aspect—i. e., cheap labor, the employment of which may easily serve to lower wages of native workmen. Child-labor laws are also undoubtedly affected by the idea of eliminating competition between children and adults; yet there can be no disputing the fact that other elements—e. g., the health and education of the children—have played a larger role in influencing public opinion in favor of limitations on the employment of children. Again, in the case of licensing laws, the motive may be to exclude people from a particular craft or occupation; frequently, however, the motive is to protect the public against incompetents who are likely to endanger the public health and safety.

I. CHILD LABOR AND STATE LAWS

Restrictions on the labor of children, both in the matter of complete prohibitions on their working in certain industries and in respect to the maximum number of hours they may work in permitted occupations, date far back in the history of labor legislation. Reasons for public interest in child labor are not hard to find: there is the realization that arduous work at an early age may, and probably will, leave a permanent mark on the child's health, if it does not kill him. There is also the feeling that children ought to go to school, that they ought to have an opportunity to play, and that they ought not to take jobs away from adults.

A very interesting transition has taken

place in attitudes toward child labor. Toward the end of the eighteenth century, and even early in the nineteenth century, a businessman who employed young children was apt to regard himself, and to be regarded by the community, as a public benefactor. This attitude was caused in part by the feeling that work was good and that children ought to be taught good habits at as early an age as possible. Probably, too, the fact that communities were often faced with the problem of feeding and otherwise providing for poor children and orphans caused them to consider as a desirable citizen anybody who would take these children off the town's hands and make them earn their own liv-

ing. In addition, child labor did not seem undesirable to people in the early stages of modern industrialism, since child labor was a customary practice in agriculture; people could not immediately perceive that working around the family's farm in the country was not the same as working in a textile mill in a crowded city.

The struggle to eliminate, or at least to reduce, child labor has been a continuing one. It has met with stubborn resistance from em-

ployers of child labor who view the loss of a cheap labor supply with considerable apprehension. Where such employers have not been able to defeat the passage of legislation, they have attempted to hinder effective enforcement. Getting a law placed on the statute books has thus been only the first stage; the second, and probably the more difficult, has been to secure the effective enforcement of the laws.

THE EXTENT OF CHILD LABOR ¹

From 1880 when the United States Census first gathered figures on child employment, the number and percentage of children under 16 years gainfully employed increased steadily every decade through 1910. In that year nearly 2,000,000 children 10 to 15 years, inclusive, were at work. One child in every six was a child laborer. Well over half a million were in non-agricultural occupations: 15,000 in coal mines; 261,000 in factories, of whom 78,000 were in textile mills, 19,000 in clothing industries, 14,000 in the iron and steel industry, 18,000 in furniture and lumber factories, and 5,000 in glass factories; 89,000 children were classified as servants; and 52,000 as messenger, bundle, and office boys and girls.

From 1910 to 1930 there was a gradual but marked reduction in child employment. This was due in part to the increasing pressure of public opinion expressed in organized efforts to improve child labor and school attendance laws; in part to the growing strength of trade unions, as in clothing manufacture and coal mining; and in part to technological changes in industry which made unprofitable the employment of immature children.

This reduction was much more pronounced in some industries than in others. Large decreases occurred in manufacturing, mining and clerical occupations; much smaller decreases in domestic and

personal service, trade and agriculture. In a few occupations increases were reported. The 1930 Census showed more children under 16 years than in 1920 employed as canvassers, as delivery boys for stores, as chauffeurs and truck drivers, as hairdressers and manicurists, and in cleaning and dyeing shops. Nor was the reduction uniform throughout the country. The employment of children in textile mills, for instance, decreased 59 per cent between 1920 and 1930 in the United States as a whole. But in contrast to Massachusetts and Rhode Island where there were decreases of 85 and 92 per cent respectively, in two important southern textile states, South Carolina and Georgia, there were increases of 24 and 12 per cent.

The Census of 1930 reported 667,118 child workers 10 to 15 years, inclusive, classified as follows:

OCCUPATIONAL DISTRIBUTION OF CHILD WORKERS

<i>U. S. Census 1930</i>	<i>(10-15 Years Inclusive)</i>
Agriculture	469,497
Manufacturing and Mechanical Industries	68,266
Trade	49,615
Domestic and Personal Service ...	46,145
Clerical Occupations	16,803
Transportation and Communication	8,717
Professional Service	4,844
Forestry and Fishing	1,562
Extraction of Minerals	1,184
Public Service (not elsewhere classified)	
ALL OCCUPATIONS	

¹ Gertrude F. Zimand, *Child Labor Facts, 1939-1940* (New York: National Child Labor Committee, 1940), pp. 5-11. Used by permission.—E.S.

In some respects the Census did not fully reveal the extent of child labor.

In the first place, it included only children 10 years of age and over. Studies over many years by the National Child Labor Committee, the Federal Children's Bureau and other organizations, of child workers in such fields as "industrialized" agriculture, industrial home work, and street trades, discovered many workers under that age. This most objectionable sector of child labor did not appear in the Census figures.

Even for the age group covered, 10 to 15 years, inclusive, the number in "agriculture" was greatly understated. The Census was taken in April when agriculture in many states is not in full swing—especially the harvest processes for which children are primarily used. In Colorado, for instance, the Census of 1930 reported 2,051 children under 16 years engaged in agricultural work. One of the large beet sugar companies of Colorado estimated that same year that 6,000 children between the ages of 6 and 16 were employed in the section in which it operated. Similarly, although the 1930 Census reported only 27 children under 16 years in the city of Philadelphia employed in agriculture, members of the New Jersey State Migratory Survey Commission personally interviewed 1,342 Philadelphia children under 16 years working on New Jersey farms that summer.

Nor did the Census reveal the large number of children engaged in industrial home work—that is, work sent out by factories to be done in the home. Home workers are utilized by many industries, especially in making artificial flowers and feathers, infants' and children's wear, knitted outerwear, assembling imitation jewelry, carding snaps and buttons, lace making, etc. Wherever industrial home work is permitted, child labor is found, for it is next to impossible to regulate child labor in the home.

Another large group which the Census

did not report is the "street traders" whose work is usually carried on before and after school hours—newsboys, magazine salesmen, bootblacks, peddlers, etc. The Census, for example, listed only 21,783 newsboys between 10 and 15 years, inclusive. But the newspaper industry, proud of its distribution system built up around school children, reported in 1934 that well over a quarter million children under 16 years were working as newsboy sellers and carriers.

Considering these three large groups of working children who were not included in the 1930 Census count—children in industrialized agriculture and other seasonal work, street traders and industrial home workers—it is a conservative estimate that more than a million children under 16 years were gainfully employed in 1930.

The exact amount of child labor at the present time is very difficult to determine. Census figures are always unreliable as the end of the decennial period approaches, but during the years since 1930 there have been more than the usual factors influencing the extent of child employment, especially for children under 16 years. The most important of these are:

1. The general unemployment situation which has operated to curtail the employment of children as well as of adults.

2. The NRA codes which abolished child labor in many industries for a two-year period (1933-1935) and whose effect in this respect continued to be felt after the codes were terminated.

3. The Wages and Hours Act of 1938 which practically eliminates child employment in industries which ship goods in interstate commerce. . . .

4. Other federal measures such as the Walsh-Healey Act setting labor standards for work done under contract for the Government and the Jones Sugar Act of 1937 which makes the prohibition of child labor a requirement which sugar beet grow-

ers must meet in order to secure benefit payments. . . .

5. The enactment of state laws in several important industrial states setting a 16-year age minimum for employment during school hours.

6. Technological changes in industry which operate to discourage the employment of immature workers.

7. Changes in state education laws and improvement in educational facilities which tend to keep children in school until a later age.

Considering all of these factors, and also the trend in child labor as revealed by work permit figures and as seen in field studies conducted by the National Child Labor Committee and other organizations, the best rough estimate that can be made at the present time would place the number of children under 16 years gainfully employed somewhere between 750,000 and 900,000.

These children can be classified in three groups:

1. *Agriculture.* By far the greatest number, probably between 500,000 and 600,000, are employed in agriculture. This figure is considerably higher than the 1930 Census figure, which, as already explained, was taken on April 1 and did not include children employed in agriculture at other periods of the year. These children are not merely giving casual assistance on the farm. The Census specifically states that its report on children gainfully employed in agriculture does not count "children working at home, merely on general household work, on chores, or at odd times on other work." Gainful employment includes only "an occupation by which the person who pursues it earns money or a money equivalent, or in which he assists in the production of marketable goods."

The recent increase in the number of migrant agricultural families, especially in the West Coast States, may bring this number even higher. . . .

2. *Intrastate Employment.* Industrial occupations probably utilize from 60,000 to 80,000 children under 16 years, including both full-time workers and those who work outside of school hours. This figure might include a very small number employed in manufacturing work which is not interstate in character. The great bulk, however, would be children working in primarily intrastate industries such as retail stores, bakeries, beauty parlors, garages, repair shops, hotels, restaurants, theatres, offices, bowling alleys, domestic service, etc.

3. *Street Trades.* Street traders under 16 years—newsboys, magazine salesmen, bootblacks, peddlers, etc.—form another large group, probably numbering from 250,000 to 400,000. The wide variation in this estimate is due to the fact that the great majority of "street traders" are boys selling and delivering newspapers and there is a discrepancy in figures as to their number compiled by the International Circulation Managers' Association in 1934 and in 1938. At the hearing on the child labor provisions of the Newspaper Code in 1934, the International Circulation Managers' Association presented an estimate of 250,000 newsboys under 16 years, of whom approximately 125,000 were under 14 years. More recently, in connection with the possibility of coverage of newsboys under the Wages and Hours Act, it ventured an estimate of 500,000, of whom 175,000 were under 14 years. Some newsboys under 14 years may be removed from employment and some of those 14 to 16 years may have their work regulated by operation of the Wages and Hours Act, but a recent ruling of the Federal Children's Bureau, based on an opinion of the Solicitor of the Department of Labor, makes it unlikely that any large number will benefit by this protective measure. . . .

In addition to these three-quarters of a million or a million children under 16 listed as gainful workers, the employment

of minors 16 and 17 years of age must be considered part of the child labor problem. This does not mean that boys and girls of this age should be barred from work, but does mean that they should not be exploited at substandard wages, and their employment should be safeguarded from moral and physical hazards and regulated as to hours and night work.

According to the Census nearly 1,500,000 boys and girls of 16 and 17 years were gainfully employed in 1930, of whom about a third were in agriculture. The Census classification is not such that one can determine how many were employed at hazardous work, and there are practically no data available as to hours, night work, or other conditions of employment. Since the 1930 Census was taken there has undoubtedly been a reduction in the number of 16- and 17-year-olds at work in line with the general curtailment of employment. On the other hand, as in the case of

younger children, the Census probably did not give an adequate count of the number employed in agriculture and other seasonal occupations. There have been no important changes in state legislation since the 1930 Census which would materially affect the number of this age group employed. Some progress has been made in state legislation barring hazardous employment, but such children are free to enter other occupations. The same is true of young workers who may be removed from hazardous occupations during the next few years under the power granted to the Federal Children's Bureau by the Wages and Hours Act to set an 18-year age minimum for hazardous work. . . .

These four groups of young workers constitute the present child labor problem—children not protected by existing federal legislation and only inadequately by state laws.

STATE CHILD-LABOR LEGISLATION ¹

The reduction of child labor has been the result of several forces: public opinion, finding expression in stricter legislation; unionization, as in the case of clothing manufacture; technological changes in industry, which have been an important factor in the textile mills; and recently, since the depression, the general scarcity of jobs and availability of older workers at low wages. . . .

Shortly after child labor became entrenched as an accepted labor policy of the early factories, some of its evils became apparent. But, strange to say, it was not the *employment* as such of very young children but their *lack of education* which aroused public apprehension. The first law dealing with child employment, a Con-

necticut statute of 1813, merely required children in factories to be instructed in reading, writing and arithmetic.

Restriction of hours came nearly two decades later. In 1842 Massachusetts and Connecticut prescribed a 10-hour day as a maximum for children under 12 and 14 years, respectively.

Minimum age regulation came even more slowly, for setting an age limit for employment meant curtailment of the supply of cheap labor. Not until 1848 was the first minimum age law enacted when Pennsylvania barred factory employment for children under 12. Twelve years was considered a high age limit. Nearly 20 years later, in 1866, Massachusetts set a 10-year age minimum for factory work.

But despite these early beginnings at control, progress was slow, and child labor steadily increased throughout the

¹ Homer Folks, *Changes and Trends in Child Labor and its Control* (New York: National Child Labor Committee, 1938), pp. 17-18.—E.S.

Nineteenth Century and the first decade of the Twentieth.

When the National Child Labor Committee was organized in 1904, several states had no age requirement whatever for children entering employment. In others it was 10, 12, or 13 years.

Fifteen states had no compulsory school

attendance laws; in some others attendance was required for two or three months a year and only until the child was 12 or 13 years old.

Only two states had established an 8-hour day for children under 16 years; about a dozen had a 10-hour day; the others had no limitation.

PRESENT STATE CHILD-LABOR LAWS

Since the child labor provisions of the Federal Wage-Hour Act are nationwide in application and take precedence over state laws which do not measure up to federal standards, this section will deal only with state child labor legislation as it affects occupations *not* covered by federal law.

In considering the adequacy of state legislation it is well to bear in mind the standard set for other occupations by federal enactment: namely, a 16-year age minimum for work during school hours, and a 14-year age minimum (with hour and night work limitations) for work outside of school hours in occupations not considered detrimental to the child's health and well-being.

State laws regulating non-manufacturing [industrial] occupations are extremely difficult to classify because of their wide variation as to occupations covered, exemptions, provisions for work before and after school hours, during vacation periods, etc. Excluding agriculture and domestic service which usually are not regulated by law, and street trades which, if regulated, are usually under special provisions, the general picture of the age minima set by the states for non-manufacturing occupations is about as follows:

- 11 states have practically no regulation as to the age at which children may engage in non-manufacturing work, although in several there is a minimum age (usually 14 years) for such work during school hours:

Georgia	South Carolina
Maine	South Dakota
Minnesota	Vermont
Montana	West Virginia
Nevada	Wyoming
Oklahoma	

- 13 states set a 14-year age minimum, but this applies only to a very few occupations (such as stores) or there are exemptions for children of 10 or 12 years, in some cases limited to work outside of school hours:

Alabama	Kansas
Arizona	Mississippi
Colorado	Missouri
Delaware	New Mexico
Florida	Oregon
Idaho	Washington
Iowa	

- 11 states set a 14-year age minimum for a fairly comprehensive list of occupations:

Arkansas	Nebraska
Illinois	New Hampshire
Indiana	North Dakota
Kentucky	Tennessee
Louisiana	Virginia
Maryland	

- 2 states set a 15-year age minimum with exemptions for children of 12 years, in one case limited to vacation periods:

California	Texas
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- 1 state sets a 15-year age minimum with 14 years outside of school hours:

Michigan

- 10 states set a 16-year age minimum during school hours, usually with 14 years outside of school hours:

Connecticut	Ohio
Massachusetts	Pennsylvania
New Jersey	Rhode Island
New York	Utah
North Carolina	Wisconsin

¹ Zimand, *op. cit.*, pp. 33-37.—E.S.

Agriculture and domestic service are usually excluded from the operation of state child labor laws either by failure to name these occupations or by definite exemption. In a few states work permits are required for children who leave school for such employment (which is frequently permitted at an earlier age than for industrial employment). In a very few states the laws referring to hours and night work apply to agriculture and domestic work, at least nominally; and one state, Wisconsin, has given the Industrial Commission power to regulate the employment of children under 16 in specified types of commercialized agriculture. In general, however, the chief restriction on agricultural or domestic work by children is that indirectly exercised through the compulsory school attendance laws. Even this, however, is far from satisfactory, especially as to agriculture. For in many states terms are shorter and standards for school attendance lower in rural districts than in urban districts; in others there are special exemptions for children engaging in farm work, and, in general, enforcement of school attendance laws in rural areas is lax.

When street trades are regulated by state legislation, it is usually by virtue of a special section of the child labor law dealing expressly with this subject and setting different standards from those for other occupations. In some states in which no such legislation exists there are municipal ordinances on this subject in one or more of the larger cities.

State laws on this subject can be summarized as follows:

27 states have no law regulating street trades:

Arkansas	Michigan	Oregon
Connecticut	Mississippi	South Carolina
Georgia	Missouri	South Dakota
Idaho	Montana	Tennessee
Illinois	Nebraska	Texas
Indiana	Nevada	Vermont
Kansas	New Mexico	Washington
Louisiana	North Dakota	West Virginia
Maine	Ohio	Wyoming

Of the 21 states with some regulation, 12 permit boys under 12 years to engage in at least certain types of street trades work:

Alabama	Florida	New Hampshire
Arizona	Iowa	New Jersey
California	Maryland	Oklahoma
Colorado	Minnesota	Utah

In many states newsboys are not covered by workmen's compensation laws, being considered "independent contractors," not employees. . . .

State legislation regulating the employment of minors 16 and 17 years with regard to hours and night work is difficult to classify because of the different standards set for different occupations and different age groups, as well as because of various exemptions. Below are listed: (1) those states which have no regulation to speak of on hours or night work, (2) those in which the regulation applies only to females, leaving boys of 16 and 17 years free to work unlimited hours and at any hour of the night, and (3) those with legislative restriction. In many of the states listed as having some regulation, it is far from adequate, hours being limited to 10 a day and night work being barred only after midnight. In a few cases states are listed as having no regulation where the law applies only to one specified industry, such as laundries, or textile mills.

HOURS OF WORK

5 states have practically no regulation whatever of hours of work for minors of 16 and 17 years:

Alabama	Florida	Georgia
Iowa	West Virginia	

22 states have some regulation but it applies to females only:

Arizona	Maine	Oklahoma
Colorado	Maryland	South Dakota
Delaware	Minnesota	Tennessee
Idaho	Missouri	Texas
Illinois	Nebraska	Virginia
Indiana	Nevada	Wyoming
Kentucky	New Jersey	
Louisiana	New Mexico	

21 states have some regulation applying to both boys and girls:

LABOR CASES AND MATERIALS

Arkansas	Montana	Pennsylvania
California	New Hampshire	Rhode Island
Connecticut	New York	South Carolina
Kansas	North Carolina	Utah
Massachusetts	North Dakota	Vermont
Michigan	Ohio	Washington
Mississippi	Oregon	Wisconsin

New Hampshire	Rhode Island	Vermont
New Mexico	South Dakota	Virginia
North Dakota	Tennessee	West Virginia
Oregon	Texas	

12 states have some regulation but it applies only to females:

Arizona	Michigan	Pennsylvania
Delaware	Nebraska	Utah
Indiana	New Jersey	Wisconsin
Louisiana	Oklahoma	Wyoming

10 states have some regulation applying to both sexes:

Arkansas	Massachusetts	South Carolina
California	New York	Washington
Connecticut	North Carolina	
Kansas	Oklahoma	

NIGHT WORK

26 states have no prohibition of night work for minors of 16 and 17 years (exclusive of restriction of night messenger work):

Alabama	Illinois	Minnesota
Colorado	Iowa	Mississippi
Florida	Kentucky	Missouri
Georgia	Maine	Montana
Idaho	Maryland	Nevada

STATE *v.* SHOREY

Supreme Court of Oregon. 1906.
48 Ore. 396; 86 Pac. 881.

Virtually no constitutional questions are involved in the laws passed by states to deal with child labor. The courts have held that the child stands to the states in the position of a ward to his guardian, and that, acting as a guardian, the state may do things in matters affecting children which it could not do in matters affecting adults. This attitude is well illustrated by the present case.

* * * *

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant was accused by information of the crime of employing a minor under the age of 16 years for a greater period than 10 hours a day, in violation of Section 5 of the child labor law of 1905, which reads as follows:

"No child under sixteen years of age shall be employed at any work before the hour of seven in the morning, or after the hour of six at night, nor employed for longer than ten hours for any one day, nor more than six days in any one week; and every such child, under sixteen years of age, shall be entitled to not less than thirty minutes for meal time at noon, but such meal time shall not be included as part of the work hours of the day; and every employer shall post in a conspicuous place where such minors are

employed, a printed notice stating the maximum work hours required in one week and in every day of the week, from such minors." Gen. Laws. 1905, p. 343.

1. A demurrer to the information was overruled, and he entered a plea of not guilty. Upon the trial it was stipulated that the averments of the information were true, and he was thereupon adjudged guilty and sentenced to pay a fine and costs. From this judgment he appeals, claiming that the law which he is accused of violating is unconstitutional and void because in conflict with the Fourteenth Amendment to the Constitution of the United States . . . and of Section 1 of Article I of the Constitution of Oregon, which reads:

"We declare that all men, when they form a social compact, are equal in rights."

These constitutional provisions do not limit the power of the state to interfere with the parental control of minors, or to regulate the right of a minor to contract, or of others to contract with him. . . . It is competent for the state to forbid the employment of children in certain callings merely because it believes such pro-

hibition to be for their best interest, although the prohibited employment does not involve a direct danger to morals, decency, or of life and limb. Such legislation is not an unlawful interference with the parents' control over the child or right to its labor, nor with the liberty of the child. . . .

. . . laws regulating the right of minors to contract do not come within this principle [guaranties offered by Fourteenth Amendment]. They are not *sui juris* and can only contract to a limited extent. They are wards of the state and subject to its control. As to them, the state stands in the position of *parens patriae*, and may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those

who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health and morals of its future citizens. . . .

The supervision and control of minors is a subject which has always been regarded as within the province of legislative authority. How far it shall be exercised is a question of expediency and propriety which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with the legislature's judgment on that subject, unless perhaps, its enactments are so manifestly unreasonable and arbitrary as to be invalid on that account. . . .¹

¹ See also *Sturges & Burn Mfg. Co. v Beauchamp*, 231 U. S. 320, 34 Sup. Ct. 60, 58 L. Ed. 245 (1913).

A SUGGESTED STATE CHILD-LABOR LAW ¹

Minimum age.—No minor under 16 years of age shall be employed, permitted, or suffered to work in, about, or in connection with any gainful occupation except housework or agricultural work performed outside of school hours in connection with the minor's own home and directly for his parent, guardian, or custodian: *Provided*, That boys 14 years of age and over may be employed outside of school hours in the sale or distribution of newspapers, magazines or periodicals subject to the provisions of chapter and of law sections relating to street trades; and *Provided*, That minors between 14 and 16 years of age may work outside school hours or during vacation in [insert here occupations to be permitted]; *Provided*, That no minor under 16 shall at any time be employed, permitted, or suffered to work on or in connection with power-driven machinery of any kind or in close proximity to such machinery.

Hours of labor.—No minor under 18

years of age shall be employed, permitted, or suffered to work in, about, or in connection with any gainful occupation, except house work or agricultural work performed outside of school hours in connection with the minor's own home and directly for his parent, guardian, or custodian, more than six consecutive days in any one week, or more than forty hours in any one week, or more than eight hours in any one day, nor shall any girl under eighteen years of age or boy under sixteen years of age be so employed, permitted, or suffered to work before the hour of seven o'clock in the morning or after the hour of six o'clock in the evening of any day, nor shall any boy between sixteen and eighteen years of age be so employed, permitted, or suffered to work before the hour of six o'clock in the morning or after the hour of ten o'clock in the evening of any day: *Provided*, That boys between 14 and 16 may be employed in the sale or distribution of newspapers, magazines or periodicals outside school hours and between 6 A. M. and 7 P. M.;

¹ The proposal of the Association of Governmental Officials in Industry's committee on child labor.

and *Provided*, That minors between 16 and 18 may be employed in a concert or theatrical performance up to 11 P. M. The combined hours of work and hours in school of children under 16 employed outside school hours shall not exceed a total of 8 per day.

Posting of hours.—Every employer shall post and keep conspicuously posted in the establishment in or about which any minor is employed, permitted, or suffered to work, a printed abstract of the legal regulations governing the employment and hours of work of minors and occupations prohibited to minors in such establishments, to be furnished by the [insert here name of official or department authorized to enforce child labor laws], and a schedule of hours of labor which shall contain the name of the minor employed or permitted to work, the maximum number of hours such minor shall be required or permitted to work on each day of the week, with the total for the week, the hours of commencing and stopping work, and the hours when the time allowed for meals shall begin and end for each day of the week. An employer may permit such minor to begin work after the time for beginning, and stop before the time for ending work, stated in such schedule; but he shall not otherwise employ or permit him to work except as stated in such schedule. This schedule shall be on a form provided by the [State official of enforcing Department] and shall remain the property of that [Department]. Every employer shall keep a time record in a form approved by the [State official or department enforcing child labor law] showing for each minor employee the time of beginning and ending work each day, the time for meal periods, and the total hours worked per day and per week.

Power of State Board to prohibit employment of minors in hazardous occupations.—No minor under 18 shall be employed, permitted, or suffered to work in any place of employment, or at any em-

ployment, dangerous or prejudicial to the life, health, safety or welfare of such minor. It shall be the duty of (State official or department authorized to enforce the child labor law) and the said (official or department) shall have power, jurisdiction, and authority, after hearings duly held, to issue general or special orders, which shall have the force of law, prohibiting the employment of such minors in any place of employment or at any employment dangerous or prejudicial to the life, health, safety, or welfare of such minors.

Hazardous employments prohibited.—No minor under 18 years of age shall be employed, permitted, or suffered to work in, about, or in connection with: Construction work of all kinds; shipbuilding; mines or quarries; stone cutting or polishing; the manufacture, transportation, or use of explosives, or explosive or highly inflammable substances; lumbering or logging operations; saw or planing mills; operating or assisting in operating punch presses or stamping machines if the clearance between the ram and the die or the stripper exceeds one-fourth inch; cutting machines having a guillotine action; power-driven woodworking machinery; machinery having a heavy rolling or crushing action; or in the care, custody, operation or repair of elevators, or other hoisting apparatus.

No girl under the age of 18 years shall be employed, permitted, or suffered to work in any hotel or restaurant; or as an usher, attendant, or ticket seller, or in a candy or cigarette booth, in any theater or place of amusement; or as a messenger in the distribution or delivery of goods or messages for any person, firm or corporation engaged in the business of transmitting or delivering messages.

No boy under 18 years of age shall be employed, permitted or suffered to work as messenger for any telegraph, telephone or messenger company between the hours of 10 P. M. and 6 A. M.

Employment Certificates required.—No minor under 18 years of age shall be employed, permitted, or suffered to work in, about, or in connection with any gainful occupation, unless his employer has procured before the employment of said minor an employment certificate issued as hereinafter prescribed. This section shall not apply to a minor engaging in housework or agricultural work performed outside school hours in connection with the minor's own home and directly for his parent, guardian, or custodian, or to the employment of a minor outside school hours in casual work usual to the home of the employer: *Provided*, That such casual employment shall not be in connection with nor form a part of the business, trade, profession, or occupation of the employer.

Issuing officer.—The employment certificate required by this Act shall be issued only by (insert name of official authorized to issue) in such form and under such conditions as may be prescribed by the (insert name of official or department authorized to supervise the issuance of certificates).

Refusal and revocation of employment certificates.—The person designated to issue employment certificates may refuse to grant such certificate if, in his judgment, the best interests of the minor would be served by such refusal.

Requirements for issuing employment certificates.—The officer authorized to issue employment certificates shall issue such certificates only upon the application in person of the minor desiring employment, and after having approved and filed the following papers:

- (a) A promise of employment signed by the prospective employer or by someone duly authorized by him, setting forth the specific nature of the occupation in which he intends to employ such minor, and the number of hours per day and days

per week which said minor shall be employed.

- (b) Evidence of age showing that the minor is of the age required by this Act, which evidence shall be as prescribed by the (State official or department authorized to supervise issuance of employment certificates).
- (c) A statement of physical fitness, signed by a public health, public school, or other physician assigned to this duty by the issuing officer with the approval of the (State official or department authorized to supervise issuance of certificates) setting forth that such minor has been thoroughly examined by such physician, and that he is either physically fit to be employed in any legal occupation, or that he is physically fit to be employed under certain limitations, specified in the statement. If the statement of physical fitness is limited the employment certificate issued thereon shall state clearly the limitations upon its use, and shall be valid only when used under the limitations so stated. The minor shall not be charged a fee for such examinations or statement of physical fitness. The method of making such examinations shall be prescribed by the State official or department authorized to supervise the issuance of certificates.
- (d) A school record filled out and signed by the principal of the school which the minor has last attended or by someone duly authorized by him, giving the full name, date of birth, grade last completed, and residence of the minor.

Said employment certificate duly issued shall be conclusive evidence of the age of the minor for whom issued in any proceeding involving the employment of the minor under the child labor or workmen's

compensation law or any other labor law of the State, as to any act occurring subsequent to its issuance.

Kinds of employment certificates.—Employment certificates shall be of two kinds, regular certificates permitting employment during school hours, and outside school hours certificates, permitting employment during the school vacation and during the school term at such time as the public schools are not in session.

Duties of employers in regard to employment certificates.—Every employer receiving an employment certificate shall, upon the commencement of the employment of such minor, so notify the issuing officer in writing, and immediately after termination of the employment shall return said certificate to the issuing officer. Failure to comply with these provisions may be cause for the refusal of certificates to such employer. A new certificate shall not be issued to any minor except upon presentation of a new promise of employment and a new certificate of physical fitness.

Said employer shall, during the period of the child's employment, keep such certificate accessible to any certificate issuing officer, attendance officer, inspector, or other person authorized to enforce this act. The failure of any employer to produce for inspection such employment certificate, or the presence of any minor under 18 in his place of work at any time other than that specified in the posted schedule of hours required in Section 3 of this act, shall be prima facie evidence of the unlawful employment of the minor. The presence of any minor in any place of employment, shall be prima facie evidence of the employment of such minor.

Certificates of age.—Upon request, it shall be the duty of the issuing officer to issue to any young person between the ages of 18 and 21 (i. e., a minor above the age for which employment certificates are required) desiring to enter employment a certificate of age upon presentation of

the same proof of age as is required for the issuance of employment certificates under this act, and such certificate duly issued shall be conclusive evidence of the age of the minor for whom issued in any proceeding involving the employment of the minor under the child labor or workmen's compensation law or any other labor law of the State, as to any act occurring subsequent to its issuance.

State supervision of the issuance of employment certificates.—The (insert name of official or department authorized to supervise the issuance of employment certificates) shall prescribe such rules and regulations for the issuance of employment certificates and age certificates as will promote uniformity and efficiency in the administration of this act, including regulations as to the evidence of age to be accepted and the method of making physical examinations. It also shall supply to local issuing officers all blank forms to be used in connection with the issuance of such certificates. Duplicates of each employment or age certificate shall be mailed by the issuing officer to this (insert name of official or department) within 5 days after issuance. The (insert name of official or department) may revoke any such certificate if in its judgment it was improperly issued or if the minor is illegally employed. If the certificate be revoked, the issuing officer and the employer shall be notified of such action in writing and such minor shall not thereafter be employed or permitted to work until a new certificate has been legally obtained.

Inspection and prosecutions.—It shall be the duty of the (enter name of official or department authorized to enforce the child labor law) and of the inspectors and agents of said (official or department authorized to enforce the child labor law) to enforce the provisions of this act, to make complaints against persons violating its provisions, and to prosecute violations of the same. The director of the said (official or department), its inspectors, and agents

shall have authority to enter and inspect at any time any place or establishment covered by this act, and to have access to employment certificates kept on file by the employer and such other records as may aid in the enforcement of this act. All persons authorized to issue certificates of physical fitness and all attendance officers and probation officers are likewise empowered to visit and inspect at all reasonable hours all places where minors may be employed.

Any person authorized to enforce this act may make demand on the employer of a minor for whom an employment certificate is not on file that such employer shall either furnish him within ten days the evidence required for an employment certificate showing that the minor is at least 18 years of age, or shall refuse to employ or permit or suffer such minor to work. Proof of the making of such demand and of failure to deliver such proof of age shall be prima facie evidence, in any prosecution brought for violation of this act, that such minor is under 18 years of age and is unlawfully employed.

Penalties.—Whoever employs or permits or suffers any minor to be employed or to work in violation of this act, or of any order or ruling issued under the provisions of this act, or obstructs the said department enforcing the child labor law, its officers or agents, or any other person authorized to inspect places of employment under this act, and whoever, having under his control or custody any minor, permits or suffers him to be employed or to work in violation of this act, shall for a first offense be punished by (insert suitable penalty, which should provide for the imposition of imprisonment, as well

as fine, or both). Each day during which any violation of this act continues shall constitute a separate and distinct offense. The penalties specified in this act may be recovered by the State in an action for debt brought before any court of competent jurisdiction, or through criminal proceedings, as may be deemed proper.

Constitutionality of Act.—If any part of this act is decided to be unconstitutional and void, such decision shall not affect the validity of the remaining parts of this act unless the part held void is indispensable to the operation of the remaining parts.

* *

The many other state laws which bear directly or indirectly upon the problem of child labor may be illustrated by reference to compulsory education laws, laws which provide for physical examination of children applying for employment certificates or "working papers," and laws which impose special penalties on employers when illegally-employed minors are hurt. As we said previously, there appears to be no basis for challenging such laws on constitutional grounds.

Of course, the effectiveness of the child-labor regulations depends perhaps more on the enforcement than it does on mere statutory provisions. States have differed, and continue to differ, substantially in the quality of enforcement as well as in the specific rules adopted for child labor. With the passage of the F. L. S. A. (below), the Children's Bureau of the U. S. Department of Labor has taken a hand in the task. It has worked out methods for co-operating with state agencies in the matter of certificates of age for children, and in all but a few states, the Children's Bureau accepts the certificates issued by state agencies as definitive. In the next years there is likely to be still closer co-operation between the federal government and the states.

II. FEDERAL CHILD-LABOR LEGISLATION

The effectiveness of state legislation concerning child labor depends not only on the skill and vigor with which the laws are enforced but also on the action of other states.

So long as some states have lax laws on child labor, efforts by other states to raise standards are almost certain to fail at least so far as concerns goods which are shipped in inter-

state commerce. To the extent that the employment of child labor results in lower costs, employers in states with high standards may have difficulty competing in the market with employers in states of low standards. Hence, even though the former may approve of the abolition, or at least the strict regulation, of child labor they may find themselves at such an economic disadvantage as to cause them to urge the relaxation of restrictions in their own states. Or, states fearful of losing their industries to other states may refuse to enact legislation which they might enact but for the low standards in other states.

Under the circumstances, it is plain that really workable control over child labor necessitates some sort of action by the federal government. In 1916, the Congress passed the first Child Labor Law, which prohibited the shipment in interstate commerce of goods produced in establishments in which, within thirty days prior to the shipment, children had been employed. This statute was challenged as an unconstitutional exercise of federal power over interstate commerce, and, in *Hammer v. Dagenhart*, the Supreme Court, by a vote of 5 to 4, held the law unconstitutional.

HAMMER *v.* DAGENHART

Supreme Court of the United States. 1918.
247 U. S. 251; 38 Sup. Ct. 529; 62 L. Ed. 1101.

MR. JUSTICE DAY delivered the opinion of the court.

A bill was filed in the United States District Court for the Western District of North Carolina by a father in his own behalf and as next friend of his two minor sons . . . employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor. . . .

The District Court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here. . . .

The attack upon the act rests upon three propositions: First: It is not a regulation of interstate and foreign commerce. Second: It contravenes the Tenth Amendment to the Constitution. Third: It conflicts with the Fifth Amendment to the Constitution.

The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen

have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work, more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock P. M. or before the hour of six o'clock A. M.?

The power essential to the passage of this act, the Government contends, is found in the commerce clause of the Constitution, which authorizes Congress to regulate commerce with foreign nations and among the States.

In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, Chief Justice Marshall . . . defining the extent and nature of the commerce power, said: "It is the power to regulate,—that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordi-

nary commodities, and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them, is such that the authority to prohibit is, as to them, but the exertion of the power to regulate. . . .

[The Court then proceeded to the discussion of the uses of the commerce power to prohibit lotteries, impure foods and drugs, and the transportation between states of women for purposes of prostitution, uses all of which had been deemed by the Court to be constitutional.]

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power. . . . The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or

used in interstate commerce, make their production a part thereof. . . .

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. . . . This principle has been recognized often in this court. . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States,—a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states. . . .

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition thus engendered may be controlled by closing the channels of interstate commerce to manufactures in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women; in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such

regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. . . .

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers. . . . The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters intrusted to the nation by the Federal Constitution. . . . To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority

over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States. . . .

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely State authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be affirmed.

MR. JUSTICE HOLMES, dissenting:

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of cotton mill situated in the United States, in which, within thirty days before the removal of the product, children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day. . . . The objection urged against the power is that the states have exclusive control over their

methods of production and that Congress cannot meddle with them; and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects; and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute,—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects, and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued to-day that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. At all events it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. . . . So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power.

The question, then, is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the

States in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State. . . .

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States, but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries, the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

MR. JUSTICE McKENNA, MR. JUSTICE BRANDEIS, and MR. JUSTICE CLARKE concur in this opinion.

BAILEY *v.* DREXEL FURNITURE COMPANY

Supreme Court of the United States. 1922.
259 U. S. 20; 42 Sup. Ct. 449; 66 L. Ed. 817.

Balked in the effort to prohibit child labor under the commerce power, the advocates of federal legislation succeeded in securing a federal law which aimed at child labor through the taxing power: i. e., a tax was imposed on employers of child labor with the idea that employers would refrain from employing children in order to escape the tax. This law was passed on by the Supreme Court in this decision.

* * * *

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

This case presents the question of the constitutional validity of the Child Labor Tax Law. The plaintiff below, the Drexel Furniture Company, is engaged in the manufacture of furniture in the Western District of North Carolina. On September 20, 1921, it received a notice from Bailey, Collector of Internal Revenue for the District, that it had been assessed \$6,312.79 for having during the taxable year 1919 employed . . . in its factory a boy under fourteen years of age, thus incurring the tax of ten per cent on its net profits for that year. The Company paid the tax under protest, and after rejection of its claim for a refund, brought this suit. On demurrer to an amended complaint, judgment was entered for the Company against the Collector for the full amount with interest. The writ of error is prosecuted by the Collector direct from the District Court. . . .

The Child Labor Tax Law is Title XII of an act entitled "An Act To provide revenue, and for other purposes," approved February 24, 1919, c. 18, 40 Stat. 1057, 1138. . . .

The law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively

state function under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation. . . . We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay the Government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover,

if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scierter is associated with penalties not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We can not avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a coördinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been

ground for suspecting from the weight of the tax it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to enact both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly

declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.

The case before us can not be distinguished from that of *Hammer v. Dagenhart*, 247 U. S. 251. . . .

. . . We must hold the Child Labor Tax Law invalid. . . .

MR. JUSTICE CLARKE DISSENTS.

THE FEDERAL CHILD LABOR AMENDMENT

The next attempt, in view of these decisions of the United States Supreme Court, was to secure an Amendment to the Constitution—an Amendment, not setting up federal standards, but merely enabling Congress to legislate with regard to child labor.

In 1924 Congress, by a vote of 297 to 69 in the House of Representatives and 61 to 23 in the Senate, passed a joint resolution giving Congress power "to limit, regulate and prohibit the labor of persons under eighteen years of age."

When this Amendment came before the states for ratification a tremendous campaign of opposition was launched, the chief antagonists being the National Association of Manufacturers and the southern textile industry. In the face of a well-financed opposition only four states ratified in 1924 and 1925. From that time until 1933 interest was at a low ebb, only two additional states taking favorable action.

The onslaught of the depression turned the attention of employers and labor alike to the wasteful practices in American industry. The spectacle of children working while adults were in the bread lines revived interest in the Amendment and fourteen additional states ratified in 1933.

This success brought a renewal of the campaign of opposition and in January, 1934, came the announcement of a National Committee for the Protection of Child, Family, School and Church, organized by the Sentinels of the Republic

for the express purpose of defeating the Child Labor Amendment. This Committee has flooded the country with literature misrepresenting the Amendment, corresponded with legislators in states where it was pending, sponsored radio talks, lined up powerful interests against the Amendment, and lobbied in the State Legislatures.

As a result of this strong opposition the Amendment again met a setback and during 1934-1938 only eight additional states ratified. The reluctance of State Legislatures to ratify is in direct conflict with public opinion. A nationwide poll conducted by the American Institute of Public Opinion in the spring of 1937 showed a majority for the Amendment in every state of the Union. For the country as a whole 76 per cent voted for ratification.

Following is a list of the states which have ratified the Amendment, with the year in which action was taken:

Arizona	1925	Nevada	1937
Arkansas	1924	New Hampshire	1933
California	1925	New Jersey	1933
Colorado	1931	New Mexico	1937
Idaho	1935	North Dakota	1933
Illinois	1933	Ohio	1933
Indiana	1935	Oklahoma	1933
Iowa	1933	Oregon	1933
Kansas	1937	Pennsylvania	1933
Kentucky	1937	Utah	1935
Maine	1933	Washington	1933
Michigan	1933	West Virginia	1933
Minnesota	1933	Wisconsin	1925
Montana	1927	Wyoming	1935

In Kansas and Kentucky the validity of ratification was challenged and diametri-

¹ Zimand, *op. cit.*, pp. 27-29.—E.S.

cally opposed opinions were handed down by the State Courts. The main points involved in both cases were: (1) whether a state can ratify after prior rejection and (2) whether the Amendment had lost its potency because of the lapse of time since it was submitted by Congress to the States. The Kansas Supreme Court upheld the

validity of ratification. The Kentucky Court of Appeals ruled ratification "void and ineffective." Both cases were appealed to the United States Supreme Court, which on June 5, 1939, by a 7 to 2 decision, ruled that the Amendment was still open to ratification by the states.

THE NATIONAL INDUSTRIAL RECOVERY ACT

A significant forward step in the limitation of child labor was taken during the N. R. A. period. Under the provisions of virtually all of the codes of fair competition, child labor was banned for children under the age of 16. While the codes did not cover domestic service, the street trades, and agriculture, in which many children are employed, they undoubtedly caused a great diminution in the number of children employed.

* * * *

The effect of this national minimum standard for the employment of children was practically to eliminate the employment of 14- and 15-year-old children from both industry and trade. In 1932, before the N. R. A. became effective, 50,023 employment certificates issued for children 14 and 15 years of age leaving school for their first full-time employment were reported by the officials of 18 States and 69 cities. In 1934 the number of employment certificates issued in these same States and cities had fallen to 13,963, a decrease of 72 per cent from 1932. Those who left school for work in 1934 for the most part went into

domestic and personal service and various miscellaneous employments not covered by the N. R. A. In 1932, 49 per cent of the children for whom occupation was reported went into manufacturing and mercantile work; in 1934, only 4 per cent. On the other hand, in 1932, 30 per cent entered the occupations classified by the census as domestic and personal service; in 1934, 81 per cent. A comparison between the trends of employment of children 14 and 15 years old, and of those 16 and 17, suggests a transference of opportunities for employment from the younger group to the older. The drop in 1933 and 1934 in the number of 14- and 15-year-old children going to work contrasts with a rise for the 16- and 17-year-old minors in the same 2 years and contrasts also with the rise in the index number for employment in manufacturing industries, which may be considered a fair measure of general industrial activity.

* * * *

With the decision of the Supreme Court holding the N. I. R. A. unconstitutional (see pp. 448-449), the code restrictions on child labor were, of course, removed. There followed a considerable increase in the employment of children, though it is likely that the pre-N. R. A. levels were not reached.

THE WALSH-HEALEY ACT

Efforts by the federal government to control child labor were not ended by the *Schechter* decision. Thus, in the Walsh-Healey Act,²

passed in 1936, which imposed conditions for the letting of federal contracts for materials, supplies, and equipment in excess of \$10,000, there is a child labor provision. Section 1(d) of the Act provides "That no male person

¹ *Labor Laws and their Administration*. Proceedings of the 21st Convention of the International Association of Governmental Labor Officials, 1935, Bulletin No. 619, U. S. Bureau of Labor Statistics (Washington: Government Printing Office, 1936), p. 14.—E.S.

² 49 Stat. 2036.—E.S.

under sixteen years of age and no female person under eighteen years of age . . . will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract. . . ."

An interesting effort to extend control over child labor in sugar growing was made by the Sugar Act of 1937.³ Under this law, the pay-

³ 50 Stat. 903.—E.S.

ment of benefits to sugar growers is conditioned on the observance of certain rules covering child labor. The Secretary of Agriculture may not authorize the payment of benefits in cases where children under the age of 14 are employed or where children between 14 and 16 are employed for more than eight hours a day; this does not apply, however, to children working for their parents on their parents' own crops.

THE FAIR LABOR STANDARDS ACT

By far the most significant step taken by the federal government in the regulation of child labor was the passage of the Fair Labor Standards Act of 1938.¹ The child labor provisions of this law substantially re-enact the provisions of the first Child Labor Law of 1916 which was declared unconstitutional in *Hammer v. Dagenhart*: i. e., Congress barred from interstate commerce goods produced in establishments in which, within thirty days prior to shipment, oppressive child labor had been employed. The definition of "oppressive child labor" is contained in Section 3 of the Act, the prohibitions on shipment and provisions for enforcement in Section 12.

SEC. 3. (1) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be

deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being. . . .

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against

¹ 52 Stat. 1060.—E.S.

the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

* * *

The changing attitude of the Supreme Court as to the extent of the federal commerce power (see, e. g., the *Jones & Laughlin* case, in Chapter 5) made it fairly safe to assume that the child-labor provisions of the F. L. S. A. would be held to come within that

power. Even more, the appointment to the Supreme Court of men whose views were known to be sympathetic to the purpose of the law seemed almost sure to cause the Court to view such a use of the commerce power more tolerantly than Supreme Court of 1918 had. In due course the doctrine of *Hammer v. Dagenhart* was overruled, in *U. S. v. Darby Lumber Co.*, reported in Chapter 7.

Thoroughgoing control of child labor cannot be expected merely from the F. L. S. A., inasmuch as it does not apply to agriculture and allied industries nor to street trades and other trades which do not produce goods which enter interstate commerce. It is quite likely that more than three-fourths of working children are beyond the scope of the act. The answer seems to lie, then, either in the ratification of the Child Labor Amendment (above) or in the adoption and firm administration by all states of uniform laws, possibly along the lines of the recommendations (above) of the Association of Governmental Officials in Industry.

III. WOMEN IN INDUSTRY

Laws relating to the employment of women cover a wide variety of subjects, for women have often been singled out by legislatures for special treatment. For the most part, the justification for such laws rests on the belief that woman is physically weaker than man and that her health must be protected against impairment by conditions which might not affect a man adversely. Hence, laws have been enacted dealing with minimum wages, maximum hours, and working conditions—these are discussed in later chapters.

In a number of instances, states have imposed complete prohibitions which exclude women from certain types of work which are regarded as hazardous, over strenuous, improper for women, or likely to result in an impairment of their morals.

Probably the commonest prohibition is that

on working in mines. Other prohibitions cover occupations which require lifting heavy weights or constant standing. Of the small number of states which have provided for rather extensive limitations on occupations open to women, the Ohio law of 1919 is probably the most detailed. This statute, in addition to forbidding many types of work between 10 P. M. and 6 A. M., prohibits the employment of women "as workers in blast furnaces, smelters, mines, quarries, except in the offices thereof, shoe-shining parlors, bowling alleys, pool rooms, bar rooms and saloons, or public drinking places which cater to males exclusively, . . . in delivery service . . . in operating freight or baggage elevators, in baggage handling, freight handling, and trucking of any kind, or in employments requiring frequent or repeated lifting of weights over twenty-five pounds."

IV. CONVICT LABOR

SYSTEMS OF PRISON LABOR ¹

Both employers and employees in private industry have expressed objection to certain aspects of convict labor and have tried to secure legislation limiting such labor. Before discussing this legislation, it might be well to note the various systems of prison labor which have been in use in the United States.

Contract system.—Under this system an outside contractor contracts with the institution for the labor of the prisoners at a stipulated amount per capita per day. The State assumes no risk of loss, as the contractor furnishes his own raw materials and generally provides his own foremen, inspectors, machinery, and tools. The institution, however, houses, feeds, clothes, and guards the prisoners, and sometimes supervises their work.

Piece-price system.—This system is nearly the same as the contract system, the only difference being that under the piece-price system the contractor, instead of paying a stated amount per day, contracts with the institution for the labor of the prisoners at an agreed price per unit of output. The contractor generally furnishes the machinery and tools, and also provides for the supervision and inspection of the prisoners while working.

State-account system.—Under this system the institution carries on the productive enterprise and disposes of the product on the general market and in competition with the goods produced by free labor. The institution assumes all the business risks. If the business is one of manufacturing, the institution buys the raw material and sells the finished product in the same way as would be done by any manufacturing concern, except that it may retain

part of the product for use in the prison. Thus, in the manufacture of shirts, part of the garments are used by the inmates of the institution and the remainder are sold in the open market under the State-account plan. The goods may be sold to individual customers or to a contractor who takes the entire output. Such a contractor must not be confused, however, with the contractor who hires work done by the prisoners. The institution under this system houses, feeds, clothes, and guards the prisoners, and directs and supervises their work.

In the past the State-account system often has been designated as the "public account" system.

State-use system.—Under this system, also, the institution carries on the business of production; use or sale of the goods produced is, however, limited to the institution in which they were produced or to other State or Federal institutions. Such other State institutions may be under the control of the same or other States or of any of their subdivisions. The purpose of this restricted-sale principle is, of course, to make the prison product available to public institutions while avoiding direct competition with free-labor products. Under the State-use plan the institutions also house, feed, clothe, guard, direct, and supervise the prisoners.

Public works and ways system.—This system is the same in effect as the State-use system, the only difference being the character of the thing produced. The public works and ways system applies not to consumption goods, but to the construction and repair of prison buildings, other public buildings, roads, parks, and bridges, and to the work of flood control, reforestation, clearing land, etc.

Lease system.—No prisoners were found working under the lease system in 1923

¹ *Prison Labor in the United States, 1932.* Bulletin No. 595, Bureau of Labor Statistics, U. S. Dept. of Labor (Washington: Government Printing Office, 1933), pp. 4-5.—E.S.

or in 1932, and it seems to have entirely disappeared from both State and Federal prisons. Under the lease system the State enters into a contract with the lessee, who agrees to receive the prisoners, paying the State a specific amount per man per day;

generally also he feeds, clothes, houses, and guards the prisoners while employed. The State reserves the right to make rules for the care of the prisoners and to inspect their quarters and place of work.

NATURE OF AND REMEDIES FOR THE PROBLEM ¹

The problem of prison-labor competition is one which the Federal Government and the States have had to face for many years. The Federal Government realized the importance of the problem as early as 1885, when the Commissioner of Labor Statistics began the first survey to ascertain the extent of the competition that existed on the open market between prison-made goods and the products of free industry. Since that time studies have been made at intervals of approximately 10 years; the latest report dealt with conditions during the year 1932.²

The survey of 1932 showed the value of prison-made goods for that year to be \$75,369,471. Only 38 per cent (\$28,949,908) of this amount, produced under the State account, piece-price, and contract systems, was destined for direct competition, as compared with the relatively large figure of about 62 per cent of the total value produced in 1923. This survey also showed that in 1905 only 26 per cent of the prisoners were employed at productive labor under the two State-use systems (State-use and public works and ways), whereas, during 1932, 65 per cent of all prisoners engaged in productive labor were working for the State under these systems. In spite of the increased use of prison labor for the State, there has been a noticeable decline in the percentage of all prisoners engaged in production.

It is well known that prison administra-

tors have a decided advantage over employers of free labor. Prisons do not have to meet usual production costs and should therefore be able to undersell any competitors. Work continues regardless of business fluctuations and, to a certain extent, is not dependent on the immediate market. The fixed overhead of prison industries is bound to be small, because housing, shelter, and food is of necessity supplied by the State and the payment of compensation is negligible.

The seriousness of the competition of prison labor was brought to light during the time that the National Industrial Recovery Act was in effect, when members of the cotton-garment industry, considering the adoption of a 36-hour week, advanced as one reason for not being able to conform with the standards established by the act, the competition of prison contractors. Recognizing the importance of this factor, the Administrator, at the instance of the President, appointed a committee to consider the cotton-garment situation, and the problem of prison-labor competition in the open market generally. After the National Industrial Recovery Act was declared unconstitutional, the President, by Executive Order of September 26, 1935, created the Prison Industries Reorganization Administration to conduct, upon the invitation of, and in cooperation with, the States, surveys of industrial operations carried on by the State penal and correctional institutions, and to recommend plans for the reorganization of such prison industries. The order provided for a board of five members, to

¹ "Prison Labor Legislation, as of June 1, 1940," *Monthly Labor Review* (June, 1940), pp. 1422-1429.—E.S.

² U. S. Bureau of Labor Statistics, Bulletin No. 595.

be known as the Prison Industries Reorganization Board. At the present date the Board has completed surveys of the prison-labor problem in Alabama, Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Maryland, Missouri, New Mexico, New York, Oklahoma, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia.

Establishing prison industries does more than lighten the financial burden of the State, for it simplifies the task of the penal administrator in maintaining discipline, rehabilitating the imprisoned men, and equipping them with a trade that they may follow upon release. These benefits must be balanced against the possible disruption of the market for the products of free labor. It would seem therefore that the problems of prison-labor competition cannot be solved simply by prohibiting prisoners from working.

In an article on prison labor appearing in the November 1936 issue of the *Monthly Labor Review*, Mr. Gustav Peck, a member of the Prison Industries Reorganization Board, stated:

It is an absolute impossibility to prevent competition completely if convicts are to be employed in any useful way, because there is almost nothing prisoners do or make which might not be done or made instead by free industry and labor. The economics of the problem are to reduce the competition to the lowest point and to plan production in such a way as to affect prices and wages as little as possible.

Another aspect of the prison-labor problem becomes apparent when it is considered in relation to interstate commerce. For years attempts by the States to regulate the sale of prison-made goods proved futile, legislation for this purpose being held invalid on constitutional grounds, especially when it concerned a shipment of goods in interstate commerce. In an early case³ the New York Court of Ap-

peals declared that the local statute which required all convict-made goods to be labeled was in conflict with the State constitution and therefore an unauthorized limitation upon the freedom of the individual to buy and sell, and that such regulation was not within the scope of the State police power. Again, in 1910, in the case of *Phillips v. Raney* (198 N. Y. 539), the New York Court of Appeals affirmed the decision of the lower court upon the authority of the case of *People v. Hawkins*, and referred to the conflict of the State law with the interstate commerce clause of the Federal Constitution. Courts in other States have reached similar conclusions to the effect that a State could regulate the sale of prison products made within its own prisons, but could not, without Congressional action, regulate the sale of convict-made goods imported from other States.

As a result of this general picture, leading labor and manufacturers' organizations repeatedly petitioned Congress for aid in meeting the competition of prison labor. It was not until 1929, when the Hawes-Cooper Act was passed, that Congress enacted any legislation on this subject. This act divested prison-made goods of their interstate character and thereby subjected them to the laws of the State where they are offered for sale, irrespective of the place of origin. The act specified that it was not to take effect until 5 years later (January 19, 1934), in order to provide sufficient time for the reorganization and readjustment of the several prison industries. This law does not prohibit the interstate shipment of prison-made goods, but permits a State to impose *restrictions upon* such goods after they are transported into the State.

The States immediately began to avail themselves of the opportunities afforded by the Hawes-Cooper Act, with the result that legislation regulating the sale of prison-made goods is now in effect in

³ *People v. Hawkins*, 51 N. E. 257.

38 States.⁴ Eleven of these States entirely prohibit the sale or distribution (including imports) of prison-made goods on the open market;⁵ 20 States have general prohibitions with certain stated exceptions; and 7 States (as well as 4 of the preceding States) specifically prohibit the sale or distribution of imported prison-made goods. Some doubt exists as to the validity of laws prohibiting the sale or distribution only of imported prison-made goods because of their discriminatory nature. . . .

Seven States (Alabama, Delaware, Missouri, Nevada, South Carolina, Vermont, and Wyoming) do not regulate the sale of prison products, while three States

⁴ Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

⁵ Although New Jersey, Pennsylvania, and Wyoming have no legislation restricting the sale of all convict-made goods on the open market, the administration provides for a closed market.

(Iowa, North Dakota, and South Dakota) only require labeling and impose no other restrictions. . . .

The States have made use of varied measures in employing prison labor—the lease, contract, piece-price, State-account, State-use, and public-works-and-ways systems. For all practical purposes, the lease system is now officially discredited in both State and Federal prisons. The use of the remaining open-market systems (contract, piece-price, and State-account) has been widely objected to because they perpetuate and encourage competition with free labor. The elimination of the lease system and curtailment of prison employment generally have brought about the development of the State-use system, under which the sale of goods produced is limited exclusively to State departments and agencies, and the public-works-and-ways system under which prisoners are engaged in the construction and maintenance of public works, etc. Organized labor has taken an active part in aiding in the establishment of the State-use system, which at present is applied in 36 States.

WHITFIELD *v.* OHIO

Supreme Court of the United States. 1936.
297 U. S. 431; 56 Sup. Ct. 532; 80 L. Ed. 778.

This is "the first decision by the United States Supreme Court relating to the constitutionality of the Hawes-Cooper Act. The complainant in this case, Asa H. Whitfield, sold shirts in Cleveland, Ohio, that had been manufactured in the Alabama Wetumpka prison. He was convicted by the Cleveland municipal court for violating the Ohio act which provided that no goods, wares, or merchandise manufactured or mined in any other State by convicts or prisoners should be sold on the open market in Ohio. The State court of appeals affirmed the decision of the lower court and a subsequent appeal was dismissed by the State supreme court, whereupon the case was carried to the Supreme Court of the United States to test the constitu-

tionality of both the Ohio statute and the Hawes-Cooper Act."¹

* * * *

MR. JUSTICE SUTHERLAND delivered the opinion of the Court. . . .

The first count simply charges, in the terms of the statute, that petitioner unlawfully sold on the open market in Ohio certain goods made by prison labor in Alabama. These goods, according to the stipulation of facts, were sold in original packages as they were shipped in interstate commerce into Ohio. When the

¹ See note p. 408.

goods were sold, their transportation had come to an end; and the regulative power of the state had attached, except so far as that power might be affected by the fact that the packages were still unbroken. But any restrictive influence which that fact otherwise might have had upon the state power was completely removed by Congress, if the Hawes-Cooper Act be valid. That act is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8, 1890 . . . as construed and upheld by this court. . . . In effect, both acts provide (the one as construed and the other in terms) that the subject matter of the interstate shipment shall, upon arrival and delivery in any state or territory, become subject to the operation of the local laws as though produced in such state or territory, and shall not be exempt therefrom because introduced in original packages. Each statute simply permits the jurisdiction of the state to attach immediately upon delivery, whether the importation remain in the original package or not. In other words, the importation is relieved from the operation of any rule which recognizes a right of sale in the unbroken package without state interference—a right the exercise of which never has been regarded as a fundamental part of the interstate transaction, but only as an incident resulting therefrom. . . . The interstate transaction in its fundamental aspect ends upon delivery to the consignee. . . .

The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil, finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Con-

gress relating to the subject also recognize the evil. In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. . . . And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. . . .

All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by non-discriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument. The proposition is not contested that the Ohio statute would be unassailable if made to take effect after a sale in the original package. And the statute as it now reads is equally unassailable, since Congress has provided that the particular subjects of interstate commerce here involved "shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case." . . .

If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider) it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act. . . .

KENTUCKY WHIP & COLLAR COMPANY *v.* ILLINOIS CENTRAL RAILROAD COMPANY

Supreme Court of the United States. 1937.
299 U. S. 334; 57 Sup. Ct. 277; 81 L. Ed. 270.

"On July 24, 1935, the Ashurst-Sumners Act (U. S. Code 1934, Supp. V, title 49, secs. 61-64) went into effect. This law materially strengthened the Hawes-Cooper Act and also supplemented State prison-labor laws. A maximum penalty of \$1,000 was imposed on any person shipping prison-made goods into a State whose laws forbade the sale on the open market of such goods. It also provided that prison-made goods must be marked, showing the name and address of the shipper and the consignee, as well as the contents, and the name of the penal institution from which the goods were shipped."¹

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This controversy relates to the constitutional validity of the Act of Congress of July 24, 1935, known as the Ashurst-Sumners Act. 49 Stat. 494.

The Act makes it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any State where the goods are intended to be received, possessed, sold, or used in violation of its laws. Goods made by convicts on parole or probation, or made in federal penal and correctional institutions for use by the Federal Government, are excepted. Packages containing convict-made goods must be plainly labeled so as to show the names and addresses of shipper and consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced. Violation is punished by fine and forfeiture.

Petitioner manufactures in Kentucky, with convict labor, horse collars, harness and strap goods which it markets in vari-

ous States. It tendered to respondent, a common carrier, twenty-five separate shipments for transportation in interstate commerce, of which ten were consigned to customers in States whose laws prohibited the sale of convict-made goods within their respective borders, five to States whose laws did not prohibit such sale but required that the goods should be plainly marked so as to show that they were made by convicts, and the remaining ten to States whose laws imposed no restriction upon sale or possession. None of the packages were labeled as required by the Act of Congress and, in obedience to the Act, respondent refused to accept the shipments. . . .

Petitioner contends (1) that the Congress is without constitutional authority to prohibit the movement in interstate commerce of useful and harmless articles made by convict labor and (2) that the Congress has no power to exclude from interstate commerce convict-made goods which are not labeled as such.

First. The commerce clause (Art. I, §8, par. 3) confers upon the Congress "the power to regulate, that is, to prescribe the rule by which commerce is to be governed." This power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." . . . By the Act now before us, the Congress purports to establish a rule governing interstate transportation, which is unquestionably interstate commerce. The question is whether this rule goes beyond the authority to "regulate."

Petitioner's argument necessarily recognizes that in certain circumstances an absolute prohibition of interstate transportation is constitutional regulation. The

¹ "Prison-Labor Legislation, as of June 1, 1940" *Monthly Labor Review* (June, 1940), pp. 1422-1429.
—E.S.

power to prohibit interstate transportation has been upheld by this Court in relation to diseased livestock, lottery tickets, commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier, adulterated and misbranded articles, under the Pure Food and Drugs Act, women, for immoral purposes, intoxicating liquors, diseased plants, stolen motor vehicles, and kidnapped persons.

The decisions sustaining this variety of statutes disclose the principles deemed to be applicable. We have frequently said that in the exercise of its control over interstate commerce, the means employed by the Congress may have the quality of police regulations. . . .

The anticipated evil or harm may proceed from something inherent in the subject of transportation as in the case of diseased or noxious articles, which are unfit for commerce. . . . Or the evil may lie in the purpose of the transportation, as in the case of lottery tickets, or the transportation of women for immoral purposes. . . . The prohibition may be designed to give effect to the policies of the Congress in relation to the instrumentalities of interstate commerce, as in the case of commodities owned by interstate carriers. . . . And, while the power to regulate interstate commerce resides in the Congress, which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws for the protection of persons and property. . . .

The contention is inadmissible that the Act of Congress is invalid merely because the horse collars and harness which petitioner manufactures and sells are useful and harmless articles. The motor vehicles, which are the subject of the transportation prohibited in the National Motor Vehicle Theft Act, are in themselves use-

ful and proper subjects of commerce, but their transportation by one who knows they have been stolen is "a gross misuse of interstate commerce" and the Congress may properly punish it "because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions." . . . Similarly, the object of the Federal Kidnaping Act is to aid in the protection of the personal liberty of one who has been unlawfully seized or carried away. . . .

On the same general principle, the Congress may prevent interstate transportation from being used to bring into a State articles the traffic in which the State has constitutional authority to forbid, and has forbidden, in its internal commerce. In that view, we sustained the acts of Congress designed to prevent the use of interstate transportation to hamper the execution of state policy with respect to traffic in intoxicating liquors. This was not because intoxicating liquors were not otherwise legitimate articles of commerce. . . .

The course of congressional legislation with respect to convict-made goods has followed closely the precedents as to intoxicating liquors. By the Hawes-Cooper Act of January 19, 1929, the Congress provided that convict-made goods (with certain exceptions) transported into any State should be subject upon arrival, whether in the original packages or otherwise, to the operation of state laws as if produced within the State. . . .

[Here the court discussed the decision in *Whitfield v. Ohio*, quoted above.]

The Ashurst-Sumners Act as to interstate transportation of convict-made goods has substantially the same provisions as the Webb-Kenyon Act as to intoxicating liquors and finds support in similar considerations. The subject of the prohibited traffic is different, the effects of the traffic are different, but the underlying principle is the same. The pertinent point is that

where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the State policy.

In the congressional action there is nothing arbitrary or capricious bringing the statute into collision with the requirements of due process of law. The Congress in exercising the power confided to it by the Constitution is as free as the States to recognize the fundamental interests of free labor. Nor has the Congress attempted to delegate its authority to the States. The Congress has not sought to exercise a power not granted or to usurp the police powers of the States. It has not acted on any assumption of a power enlarged by virtue of state action. The Congress has exercised its plenary power, which is subject to no limitation other than that which is found in the

Constitution itself. The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection.

Second. As the Congress could prohibit the interstate transportation of convict-made goods as provided in section one of the Act, the Congress could require packages containing convict-made goods to be labeled as required by section two. The requirement of labels, disclosing the nature of the contents, the name and location of the penal institution where the goods were produced, and the names and addresses of shippers and consignees, was manifestly reasonable and appropriate for the carrying out of the prohibition. . . . The fact that the labeling was required in all shipments of convict-made goods, regardless of the law of the State of destination, does not invalidate the provision, as its scope could reasonably be deemed to be necessary to accomplish the legitimate purpose of the Act. . . .

V. ANTI-ALIEN LEGISLATION

Whenever there is a scarcity of business or of jobs, there is likely to be considerable pressure to bar outside businessmen or outside workers, in order that local merchants and workers be protected against competition. We have seen this attitude develop especially since the beginning of the depression; the great increase in unemployment has led to the feeling, translated into law in some jurisdictions, that if jobs are available they should be given to "home talent." Campaigns to "patronize your neighborhood drugstore" have a similar explanation. Under such circumstances, it becomes a patriotic duty to spend your money within the town, to hire local boys to do your work, etc. The net effect of the multiplication of such attitudes may well be to heighten a parochial attitude of mind and to place even more barriers than now exist in the way of free exchange of

goods and services among the states of the Union.

Discriminations against Americans from other cities and other states are a relatively recent development; much older are the discriminations aimed at aliens, i. e., non-citizens of the United States. Without doubt, anti-alien laws and attitudes are brought about primarily by a belief that, in a world of scarcity, all the opportunities should be conserved for the citizens. Supplementing this is the belief that it is proper to exclude aliens from certain professions such as law and from certain work (such as in defense industries) regarded as especially important to the national well-being.

Hostility toward aliens has taken a variety of forms: e. g., certain of the Far Western states have prohibited aliens (i. e., Japanese) from owning land; other states have

barred aliens from engaging in certain types of business (as operating a saloon or peddling) or from hunting and fishing. The attitude of the courts toward these and similar statutes has been that where aliens are barred from some use of the public domain, e. g., the forests and the streams, or where the state has some particular interest to serve which might be harmed by aliens, e. g., operating saloons, prohibitions are valid. In other cases, prohibitions on aliens are unconstitutional, as being a denial of equal protection of the laws under the Fourteenth Amendment.¹

¹ The right of a state to deny liquor licenses to aliens was upheld in *Trageser v. Gray*, 73 Md. 250, 20 Atl. 905 (1890) on the ground that the business was a peculiar one and the state had a great interest in seeing that its attempts to keep down intoxication were not interfered with by aliens. Along the same lines was the decision in *Miller v. Niagara Falls*, 202 N. Y. Supp. 549 (1924) upholding the validity of a municipal ordinance which barred aliens from getting licenses to sell at retail any beverage except tea, coffee, cocoa, chocolate, milk, and buttermilk. State courts have differed as to the right of a state to deny peddlers' licenses to aliens. The Maine Supreme Court, in *State v. Montgomery*, 94 Me. 192,

With respect to prohibitions or limitations on the employment of aliens, several things appear settled. First, it is unconstitutional to impose a tax on employers of aliens which does not apply to employers of others.² Second, aliens may not be denied licenses to engage in certain occupations, as barbering, where there appears no reason why aliens should be less desirable as barbers than natives.³ Third, laws which discriminate against aliens in private employments are, by and large, unconstitutional. However, laws which discriminate against aliens on public employments are constitutional.

47 Atl. 165 (1900), held such a denial to violate the "equal protection" clause of the federal constitution. On the other hand, the Massachusetts Supreme Judicial Court, in *Commonwealth v. Hana*, 195 Mass. 262, 81 N. E. 149 (1907) ruled that the opportunities for fraud which existed in the peddling business justified the state in throwing various precautions about the business—one of the precautions being a prohibition of aliens.—E.S.

² See, e. g., *Fraser v. McConway*, 82 Fed. 257 (1887); *Juniata Limestone Co. v. Fagley*, 187 Pa. 193, 40 Atl. 977 (1898).—E.S.

³ *Templar v. State Board of Examiners*, 131 Mich. 254, 90 N. W. 1058 (1902).—E.S.

PEOPLE v. CRANE

Court of Appeals of New York. 1915.
214 N. Y. 154; 108 N. E. 427.

In 1909, New York passed a law (Laws of New York, 1909, chap. 36) which provided that in the construction of public works only citizens of the United States were to be employed and where possible preference was to be given to citizens of the state. This statute was challenged on the ground, among others, that it violated the due process and equal protection clauses of the Fourteenth Amendment.

* *

CARDOZO, J: . . . The moneys of the state belong to the people of the state. They do not belong to aliens. The state, through its legislature, has given notice to its agents, that in building its public works, it wishes its own moneys to be paid to its own citizens, and if not to them, then, at least, to citizens of the United States. The argument is made

that in thus preferring its own citizens in the distribution of its own wealth, it denies to the alien within its borders the equal protection of the laws.

The people, viewed as an organized unit, constitute the state. . . . The members of the state are its citizens. . . . Those who are not citizens, are not members of the state. Society, thus organized, is conceived of as a body corporate. Like any other body corporate, it may enter into contracts, and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the state, or expending the state's moneys, are trustees for the people of the state. . . . It is the people, i. e., the members of the state, who are contracting or expending their own moneys through agencies of their own

creation. . . . Every citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism, in the administration of the trust. But an alien has no such interest, and hence results a difference in the measure of his right. To disqualify citizens from employment on the public works is not only discrimination, but arbitrary discrimination. To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.

The power of a state to discriminate between citizens and aliens in the distribution of its own resources is sanctioned alike by decisions of the courts and long-continued practice. Neither aliens nor the citizens of other states are invested by the constitution with any interest in the common property of the people of this state. . . . It has been held, therefore, that a state may deny to aliens, and even to citizens of another state, the right to plant oysters or to fish in public waters. . . . It may restrict to its own citizens the enjoyment of its game. . . . It may discriminate between citizens and aliens in its charitable institutions, or in other measures for the relief of paupers. . . . It may make the same discrimination in the distribution of its public lands . . . ; its mines . . . ; its forests; or other natural resources. It may deny to aliens the right to hold or inherit real estate, except where the right has been secured by treaty. . . . The principle that justifies these discriminations is that the common property of the state belongs to the people of the state, and hence, that, in any distribution of

that property, the citizen may be preferred.

To defeat this law it must, therefore, be held that the constitution gives to the state a narrower liberty of choice in the expenditure of its own moneys than in the use or distribution of its other resources. I can find no justification for the supposed distinction. . . .

[BARTLETT and SEABURY, JJ., wrote concurring opinions. COLIN, J., dissented.]

* * * *

The decision of the New York Court of Appeals in the *Crane* case was upheld by the United States Supreme Court.¹ A similar decision had been handed down by the Supreme Court in the case of *Heim v. McCall*² which also involved the anti-alien law of New York. Mr. Justice McKenna, in declaring that the law, which provided that preference was to be given to citizens of New York in the construction of public works by or on behalf of the state or the municipalities, was constitutional, cited the decision of the Supreme Court in *Atkin v. Kansas* (see below, pp. 506-508), where the Court had said, ". . . it belongs to the state, as the guardian and trustee for its people and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities."

In distinguishing between discriminations on public and on private work, the courts have laid emphasis on the fact that where the state is itself an employer it may decide against the employment of aliens; such discrimination, if not "fair," is permissible—the state, as employer, is apparently under no obligation to avoid discrimination. Where, however, the state is laying down regulations for the behavior of private industry it may not bar aliens from employment, at least not until there is a definite showing that the employment of aliens will work a definite public harm.

¹ 239 U. S. 195; 36 Sup. Ct. 85 (1915).—E.S.

² 239 U. S. 175; 36 Sup. Ct. 78 (1915).—E.S.

TRUAX *v.* RAICH

Supreme Court of the United States. 1915.
239 U. S. 33; 36 Sup. Ct. 7; 60 L. Ed. 135.

MR. JUSTICE HUGHES delivered the opinion of the Court. . . .

[The Arizona law in question provides that all employers of five or more are to have a work force of which at least 80 per cent are "qualified electors or native-born citizens of the United States or some subdivision thereof."]

The question, then, is whether the act assailed is repugnant to the 14th Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union. . . . Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws. . . . The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. . . . The case now presented is not within these decisions, or within those relating to the devolution of real property . . . and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise. . . .

It is sought to justify this act as an exercise of the power of the State to make reasonable classifications legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with a broad

range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption "that the employment of the aliens, unless restrained, was a peril to the public welfare." The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interest of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those

lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

It is insisted that the Act should be supported because it is not "a total deprivation of the right of the alien to labor"; that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of 20 per cent of his employees. But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class or work, it cannot be denied that the authority exists to make its measure to that end effective. . . . If the restriction to 20 per cent now imposed is maintainable, the state undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment,

and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employees to be aliens, or even a less percentage; or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly . . . ; but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls within the condemnation of the fundamental law. . . .

VI. EXAMINING AND LICENSING

Both state and federal courts have on innumerable occasions remarked that the right to work is one of the fundamental rights guaranteed the individual against deprivation without due process of law. This may be taken to mean that ordinarily the individual may engage in any occupation of his choice and that legislative interference with his choice of occupation would be an unconstitutional act. In a number of instances, however, legislatures have undertaken to restrict entrance into certain businesses, trades, and professions by setting standards for would-be entrants and excluding those who fall short of the standard set.

It is well known, for example, that one may not engage in most public utility busi-

nesses (e. g., railroads, telephone, telegraph) until the appropriate governmental agency has issued a "certificate of convenience and necessity." Similarly, one may not practice medicine, dentistry, or law until a license to do so has been received. In many states, a person may not act as a dealer or broker in securities until he has been licensed, and similar requirements have recently been imposed—so far as interstate transactions are concerned—by the Securities Exchange Act. In the same way, various states have provided that a person may not work as a stationary engineer, as a chauffeur, as a plumber, as a barber, or as a pilot on a steamship, until he has received a license to engage in the given trade.

Before a license or its equivalent is issued, the applicant may have to furnish proof of his competence to pursue the occupation of his choice, of his having fulfilled certain educational requirements, of his being free from certain physical defects (e. g., color-blindness in the case of locomotive engineers or communicable disease in the case of food-handlers), or of his having had a minimum period of experience, or of his being a person of good character and financial responsibility (e. g., securities dealers and brokers).

By and large, the reason for the imposition of such requirements lies in the desire of the government to protect the public. Clearly, a dishonest broker or an incompetent doctor or lawyer may do considerable harm to an undiscerning customer, patient, or client. Equally, the interests of public health and safety justify precautions in the case of locomotive engineers, stationary engineers, plumbers, electricians, barbers, chauffeurs, etc. The courts have been quite willing to recognize the nature of the public interest in these callings and to affirm the constitutionality of the enactments.

On the other hand, laws which on their face appear to be dedicated only to the public good may in fact have an ulterior motive: the protection of vested interests by keeping down the number of competitors. The desire to limit competition is common to most trade and industrial groups; it is as true of barbers and plumbers as it is of doctors and lawyers. Under the guise of protecting the public health and safety, such groups may persuade legislatures to set requirements whose real purpose is to restrict the number of entrants by one means or other.

The right of a state to require licenses of stationary engineers and to impose succes-

sively more stringent experience requirements for larger motors was recognized by the Supreme Court of Minnesota in *Hyvonen v. Hector Iron Co.*, 103 Minn. 331, 115 N. W. 167 (1908).

The protection of the public health has been recognized as a justification for the requirement of experience in order to become a barber. In *People v. Logan*, the Supreme Court of Illinois affirmed the constitutionality of a statute which required three years' training as an apprentice or as a student in a "barber college" and knowledge concerning common diseases of the face and skin. Concerning the three-year requirement, the court said:

It is argued that the requirement of three years' service . . . has no direct relation to the public health or safety, but is rather intended to restrict and discourage the public from engaging in this occupation. The intention is to restrict the public from engaging in this occupation to the extent that only those may do so who have learned the trade; know how to prepare, use, and care for the tools; know what sanitary precautions must be taken to avoid the risk of spreading disease. . . . Three years seems a long time to require for learning the trade of a barber, but we can not say that it is so unreasonably long as to constitute an unreasonable restriction upon the right to engage in the trade.¹

¹ 284 Ill. 83, 119 N. E. 913 (1918). See also U. S. Bureau of Labor Statistics, *Bulletin No. 258* (Washington: Government Printing Office, 1920), p. 130. The constitutionality of an ordinance requiring licenses for electricians has also been upheld by the courts; see, for example, *Becker v. Pickersgill*, 105 N. J. L. 51, 143 Atl. 859 (1928). Also, licensing of plumbers has been upheld as a protection of the public health; see, for example, *People v. Rogers*, 74 Colo. 184, 219 Pac. 1076 (1923).—E.S.

SMITH v. ALABAMA

Supreme Court of the United States. 1888.
124 U. S. 465; 8 Sup. Ct. 564; 31 L. Ed. 508.

Alabama passed a law providing for the licensing of locomotive engineers and imposing penalties for operating locomotives without a license. The statute was questioned on two grounds: (1) that it was unconstitutional for a state to regulate interstate commerce;

(2) that the law was not a proper exercise of the state's power. As to the first objection, the Supreme Court said that the statute did not regulate interstate commerce. The second objection is considered in the quotation below.

MR. JUSTICE MATTHEWS: . . . Certainly it is the duty of every carrier, whether engaged in the domestic commerce of the State or in interstate commerce, to provide and furnish itself with locomotive engineers . . . competent and well qualified, skilled and sober; and if, by reason of carelessness in the selection of an engineer not so qualified, injury or loss are caused, the carrier, no matter in what business engaged, is responsible according to the local law admitted to govern in such cases, in the absence of congressional legislation. . . .

If a locomotive engineer, running an engine, as was the petitioner in this case, in the business of transporting passengers and goods between Alabama and other States, should, while in that State, by mere negligence and recklessness in operating his engine, cause the death of one or more passengers carried, he might certainly be held to answer to the criminal laws of the State if they declare the offence in such a case to be manslaughter. The power to punish for the offence after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offence.

It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and prop-

erty demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject that they can be required to give way to the supreme authority of the Constitution.

In conclusion, we find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and thirdly, that so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

For these reasons, we hold this statute, so far as it is alleged to contravene the

Constitution of the United States, to be a valid law. . . .

NASHVILLE, C. & ST. LOUIS RAILWAY *v.* ALABAMA

Supreme Court of the United States. 1888.
128 U. S. 98; 9 Sup. Ct. 28; 32 L. Ed. 353.

MR. JUSTICE FIELD. . . . A statute of Alabama . . . declares that all persons afflicted with color-blindness . . . are "disqualified from serving on railroad lines within the State in the capacity of locomotive engineer, fireman, train conductor, brakeman, station agent . . . or in any other position which requires the use or discrimination of form or color signals;" . . .

It was contended in the court below, among other things, that the statute of Alabama was repugnant to the power vested in Congress to regulate commerce among the States. . . . Color-blindness is a defect of vital character in railway employes in the various capacities mentioned. . . . It is a matter of the greatest importance to safe railroad transportation of persons and property that strict examination be made as to the existence of this defect in persons seeking employment on railroads in any of the capacities mentioned.

It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employes and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But, until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains while within their limits. Indeed, it is a principle fully recognized . . . that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable. . . .

SMITH *v.* TEXAS

Supreme Court of the United States. 1914.
233 U. S. 630; 34 Sup. Ct. 681; 58 L. Ed. 1129.

Under a Texas law, it was unlawful for any person to act as a conductor of a freight train without having previously served for two years as a conductor or brakeman on such trains. The effect of the statute was to provide a promotion system by which brakemen would be moved up to the position of conductors on freight trains. The Supreme Court recognized the right of a state to prohibit incompetents from working on railroads, in the interest of public safety. This statute did not, however, permit men other than brakemen to establish their competence,

so that brakemen were given a monopoly of the jobs.

* * * *

MR. JUSTICE LAMAR delivered the opinion of the court. . . .

. . . The case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer it

—and the answer in no way denies the right of the State to require examinations to test the fitness and capacity of brakemen, firemen, engineers and conductors to enter upon a service fraught with so much of risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families. A statute which permits the brakeman to act—because he is presumptively competent—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety but denies to many the liberty of contract granted to brakemen and operates to establish rules of promotion in a private employment.

If brakemen only are allowed the right of appointment to the position of con-

ductors, then a privilege is given to them which is denied all other citizens of the United States. If the statute can fix the class from which conductors on freight trains shall be taken, another statute could limit the class from which brakemen and conductors on passenger trains could be selected, and so, progressively, the whole matter, as to who could enter the railroad service and who could go from one position to another, would be regulated by statute. In the nature of the case, promotion is a matter of private business management, and should be left to the carrier company, which, bound to serve the public, is held to the exercise of diligence in selecting competent men, and responsible in law for the acts of those who fill any of these positions. . . .

MR. JUSTICE HOLMES dissents.

CHAPTER SEVEN

WAGE LAWS

Two distinct types of wage laws have been passed in the United States. Of these, one deals with the regulation of the rate of wages: i. e., minimum-wage laws which prohibit the payment of less than a certain rate of wages. The second type includes laws covering the time of payment, the basis of payment, the form of payment, deductions from wages, etc. Laws of the latter

type had been on the statute books for decades before minimum-wage laws were first passed, and their constitutionality had been repeatedly affirmed long before similar recognition was given to minimum-wage laws. Apparently, both legislatures and courts have been more willing to protect the worker in the collection of his wages than in the determination of the rate.

I. STATE MINIMUM-WAGE LAWS

Minimum-wage legislation in the United States has been marked by two distinct phases: one, beginning with the passage of the Massachusetts law in 1912 and ending with the decision of the U. S. Supreme Court in the *Adkins* case in 1923, the second, beginning in the early 1930's and continuing to the present. These two periods present certain interesting contrasts: (1) in the earlier period, the laws concerned women and children exclusively, in the latter, they were in part extended to men; (2) in the earlier period, the primary object, indeed the sole object, seemed to be to protect women's health and morals

against impairment—in the present phase, this objective has yielded largely to the desire to spread the work and to attain economic recovery through increased purchasing power; (3) all of the legislation of the 1912-23 period was state legislation (the law passed by Congress for the District of Columbia was enacted by virtue of Congress' peculiar powers over the District, very much like those of a state)—since 1933, there have been several federal minimum-wage laws; (4) the attitude of the U. S. Supreme Court toward the constitutionality of minimum-wage laws has undergone a distinct change.

THE CASE FOR MINIMUM-WAGE LAWS FOR WOMEN

Authorities agree that the adequacy or inadequacy of wages determines the standard of health of the workers, and hence the standard of public health. No one can maintain health whose earnings are too small to afford the necessities of existence, and to obtain these necessities adequate wages are indispensable.

¹ *Stettler v. O'Hara*. Supreme Court of the United States. October Term, 1916. Brief for Defendants in Error upon Reargument, pp. 77, 99, 114, 127, 290. See also the Factual Brief Submitted by New York to the Supreme Court in 1936 in *Morehead v. New York ex rel. Tipaldo*.—E.S.

The dangers to the health of women from low wages are two-fold: lack of adequate nourishment and lack of medical care in sickness.

1.—Investigation proves that with insufficient wages, food is necessarily cut down below the level of subsistence. In order to meet unavoidable expenses for lodging and clothing, working women often reduce their diet to the lowest possible point and health inevitably suffers. Moreover persons who are underfed suffer greater injury from insufficient cloth-

ing than those who are well nourished.

2.—Investigation proves that workers receiving the lowest wages are able to spend least on the maintenance of health. Hence they are often without care in sickness, although their need is greatest by reason of low earnings and consequent hardship. Expenditures for medical treatment increase as income increases. But among the lowest paid workers, the percentage of income spent for the care of health has been found highest. . . .

Health is the foundation of the state. It is a matter of common knowledge, universally accepted, that when the health of women has been injured in industrial work, not only is the working efficiency of the community impaired, but the deterioration is handed down to succeeding generations. The health of the race is conditioned upon preserving the health of women, the future mothers of the Republic. . . .

Authorities agree in the opinion that while the underpayment of women and the consequent struggle to live may not be the primary cause for entering upon an immoral life, low wages are inextricably bound up with low morals. When wages are too low to supply nourishment and other human needs, temptation is more readily yielded to. Moreover by lowering all the standards of family life, through overcrowding and the like, low wages contribute indirectly to the deterioration of morals and predispose the underpaid workers to seek recreation by questionable means. . . .

Investigation proves that the standard of living is fixed by the wages received. With insufficient wages, expenditures for living must be curtailed below the requirements of healthful existence. Overcrowding in housing with the consequent loss of privacy, insufficient clothing, and the lack of all legitimate recreation, have been found to result from under-payment.

These privations involve not only individual suffering but a social loss. Where

the individual's standards of living are too much depressed, the community's must inevitably decline.

No better gauge of the effect of inadequate wages upon standards of living exists than the rate of infant mortality in different communities. The investigations of the Federal Children's Bureau show that the infant mortality rate rises or falls almost *pari passu* with an increase or decrease in the family income. . . .

Repeated investigations made by federal and state governments have proved that only a negligible proportion of wage-earning women are working for "pin money." The great majority work to support themselves, or assist substantially in the support of their families..

According to various estimates, one-quarter to one-fifth of the women workers of the United States work to support themselves away from home.

Of the 75 to 80 per cent of working women who live at home, an overwhelming proportion contribute practically all their wages either to supplement the family income, or to support families in which there is no male wage earner. The wage-earning daughter who lives at home as a rule pays not only for her own support, but contributes towards the expenses of the non-wage-earning members of the family.

As to the proportion of women who are supporting families in which there are no male wage-earners, a recent typical state investigation of about 2,000 wage-earning women shows that two-thirds lived at home, and of these, twenty per cent were members of families in which there was no male wage earner.

Thus the assumption that working women do not need to receive a living wage is based upon a fallacy, because: (1) An ascertained proportion of wage-earning women work to support themselves alone, away from home. (2) An ascertained proportion of those who live at home contribute towards the support of

one or more persons besides themselves.
(3) A third group works to support fami-

lies in which there are no male wage-earners. . . .

WAGES AND ECONOMIC RECOVERY

. . . Because of the millions of the unemployed, the inevitable effect has been to break down all labor standards, to break down the standards of working conditions, to lengthen out the hours, to break down the standards of wages, and so to deflate to a terrifying extent that labor which still had any employment whatsoever.

Now, the result of that upon the managers of industry has been equally or more distressing, because those who desired to maintain fair conditions of wages and working conditions found themselves absolutely unable to compete with business enterprises that constantly cut wages and operated under very unfair and unhappy working conditions. So again, there is no doubt a common purpose and desire among both the managers in industry and the workers in industry to try to establish, in some way, decent standards of wages and working conditions, and I believe it has come to be realized by both groups in the period of this depression that the most unfair competition that existed in industry was the competition through depressed and disorganized and deflated labor.

In other words, the manufacturer who desired to put out a decent product at a decent price, and at the same time pay decent wages, found that he was simply up against a competition that he could not meet, and, willy-nilly, he had to cut wages and he had to work long hours, and he simply had to oppress his employees, although he might have desired to do the square thing and the right thing.

There is another factor that has de-

veloped; I do not need to go into it at great length, because we are all familiar with it; and that is the terrific effect upon the country at large of a decline in purchasing power. The great purchasing power of the country comes from those who work for a living, either on the farms or in the factories or in transportation, and if wages of labor are depressed at a time also when labor is thrown out of employment by millions of workers, of course we are all familiar with the result to the entire prosperity of the country.

This decline in purchasing power has simply been a steady spiral downward, and here is this competitive factor which has forced the better-intentioned man, we will say, to constantly meet the competition of those who were more ruthless in beating down prices at the expense necessarily of labor; and I believe it has been realized that that was one of the great continuing causes of this downward spiral of the depression, and that the only way to reach it was in some way to arrive at the possibility of industrial agreements which would determine the standards of fair competition, and particularly the competition for workers; in other words, would fix minimum wages, would fix maximum hours, according to the needs of specific groups in industry, so that at least goods might be produced under conditions that would afford decent living standards to the workers who were employed, would maintain their purchasing power, and at the same time would permit the managers of industry to compete in the markets, which they could not do as long as the utterly unrestricted competition was allowed which was breaking down our standards. . . .

¹ Taken from a statement by Donald Richberg in *National Industrial Recovery*, Hearings on H. R. 5664, 73d Congress, 1st Session (Washington: Government Printing Office, 1933), pp. 66-67.—E.S.

MINIMUM-WAGE LAWS, 1912-1923

The first minimum-wage law in the United States was passed by Massachusetts in 1912, the law to become effective in 1913. In 1913 eight States—California, Colorado, Minnesota, Nebraska, Oregon, Utah, Washington, and Wisconsin—passed laws providing for the regulation of the rates of pay of women and minors. The year 1913 was really the beginning of the American experiment. Several things contributed to bring about the burst of sentiment for wage regulation. The first decade of the twentieth century saw a growing wave of interest in women workers. The United States awoke to the fact that it was a great industrial community, not a pioneer State. The country began to be concerned about the conditions under which thousands of its citizens labored for wages. To the amazement of many it was discovered that millions of women were employed in store and factory. This growing interest is reflected in the reports published by the State departments of labor. In State after State these reports change from lists of the State's natural resources and development to tables on rates and earnings. Private organizations, too, began studying phases of industrial life and printing their findings. Starting with modest beginnings at just about the beginning of the century the tide grew, culminating in a great study made by the Federal Government in 1907-1910—"Woman and child wage earners in the United States." The rate and earnings disclosed by these studies were shockingly low in the majority of cases. Public opinion was aroused. The Progressive Party in its 1912 platform had a plank advocating minimum-wage laws for women and children.

That the United States should have

turned toward this effort which the other English-speaking nations were making to correct bad conditions, when it awoke to the need of putting its own house in order, was but natural. The laws of Australia, New Zealand, and Great Britain were well known to large groups of people who were disturbed about the exceedingly low rates of pay that so many of the woman wage earners were receiving. These laws seemed to have been successful in alleviating to some extent the distress among the lowest paid groups. They did not seem to have hurt industry. They had been adopted not only by the frontier States of Australia and New Zealand but by highly industrialized Great Britain. It was true they applied to both men and women, and that their administration and enforcement in many cases was tied up to compulsory arbitration. To the American mind State regulation of men's wages and compulsory arbitration were repugnant. Both these smacked too much of the interference of government in everyday life which it is the American inheritance to fear. Moreover, at this particular moment the especial concern was the low wages paid to women. It was proposed, therefore, to adapt the plan to American needs and desires.

By 1912-13 the question of some sort of wage regulation was so prominent in people's minds that Massachusetts and Michigan appropriated money for special investigations of the conditions surrounding woman wage earners. These investigations once more produced startlingly low rates and earnings figures. Massachusetts promptly passed a minimum-wage law for women and minors. Almost at once eight other States joined Massachusetts in putting such laws on their statute

¹ *The Development of Minimum Wage Laws in the United States, 1912 to 1927*. Bulletin No. 61 of the Women's Bureau, U. S. Dept. of Labor (Wash-

ington: Government Printing Office, 1928), pp. 3-4.—E.S.

books. After this the movement slowed down, but by 1923, when South Dakota enacted a minimum-wage law, eight more States—Arizona, Arkansas, the District of

Columbia, Kansas, North Dakota, Porto Rico, South Dakota, and Texas—had enacted minimum-wage legislation. . . .

STATE *v.* CROWE

Supreme Court of Arkansas. 1917.

130 Ark. 272; 197 S. W. 4.

Before the Supreme Court's decision in the *Adkins* case in 1923, the state courts favored minimum-wage legislation. In every case in which a minimum-wage law was challenged before the highest court of a state, the constitutionality of the statute was affirmed.

In the present case, the Supreme Court of Arkansas upheld the constitutionality of the Arkansas minimum-wage law which had been attacked on the ground, among others, that it violated the Fourteenth Amendment by interfering with the liberty of both employer and employee to make contracts.

* *

HART, J. . . . It is true that it has often been held by the Supreme Court of the United States that the general right to contract is protected by the Fourteenth Amendment to the Constitution, yet it is equally well settled that this liberty is not absolute, but that a State may, in the exercise of its police power, prevent the individual from making certain kinds of contracts. . . .

It is a matter of common knowledge of which we take judicial notice that conditions have arisen with reference to the employment of women which have made it necessary for many of the States to appoint commissions to make a detailed investigation of the subject of women's work and their wages. Many voluntary societies have made this question the subject of careful investigation. Medical societies and scientists have studied the subject, and have collected carefully prepared data upon which they have prepared written opinions. It has been the consensus of opinion of all these societies,

medical and other scientific experts that inadequate wages tend to impair the health of women in all cases and in some cases to injuriously affect their morals. Indeed it is a matter of common knowledge that if women are paid inadequate wages so that they are not able to purchase sufficient food to properly nourish their bodies, this will as certainly impair their health as overwork. It is certain that if their wages are not sufficient to purchase proper nourishment for their bodies, the deficiency must be supplied by some one else or by the public, if they are to keep their normal strength and health. The investigations above referred to show that it has become absolutely necessary for many women to work to sustain themselves, and that they have no one to assist them. The strength, intelligence, and virtue of each generation depends to a great extent upon the mothers. Therefore the health and morals of the women are a matter of grave concern to the public, and consequently to the State itself.

The members of the Legislature come from every county in the State. The presumption is that it passed the statute to meet a condition which it found to exist and to remedy the evil caused thereby. . . . Every argument put forward to sustain the maximum hours law or the restriction of places where women work applies equally in favor of the minimum wage law as also being within the police power of the State and as a regulation tending to guard the public morals and the public health. . . .

WILLIAMS *v.* EVANS

Supreme Court of Minnesota. 1917.
139 Minn. 32; 165 N. W. 495.

HALLAM, J. . . .

[This case involves the constitutionality of the Minnesota minimum-wage law of 1913.]

There is a notion . . . that women in the trades are underpaid, that they are not paid so well as men are paid for the same service, and that in fact in many cases the pay they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissions have resulted in findings to the above effect. Starting with such facts, there is opinion, more or less widespread, that these conditions are dangerous to the morals of the workers and to the health of the workers and of future generations as well.

It is a strife for employer and employee to secure proper economic adjustment of their relations so that each shall receive a just share of the profits of their joint effort. In this economic strife, women as a class, are not on an equality with men. Investigating bodies, both of men and of women, taking all these facts into account, have urged legislation designed to assure women an adequate working wage. . . .

It is not a question of what we may our-

selves think of the policy or the justification of such legislation. The question is, is there any reasonable basis for legislative belief that the conditions mentioned exist, that legislation is necessary to remedy them, and that laws looking to that end promote the health, peace, morals, education or good order of the people. . . . If there is reasonable basis for such legislative belief, then the determination of the propriety of such legislation is a legislative problem to be solved by the exercise of legislative judgment and discretion. . . .

We think sufficient basis exists. It is not necessary that we should hold that statutes of this kind applicable to men would be valid. We think it clear that there is such an inequality or difference between men and women in the matter of ability to secure a just wage and in the consequences of an inadequate wage that the legislature may by law compensate for the difference. ¹

¹ In a later case, *Miller Telephone Co. v. Minimum Wage Commission*, 145 Minn. 262, 177 N. W. 341 (1920), the state supreme court, in discussing the powers of the minimum wage commission, restated the objectives of the law. See also *Larsen v. Ruce*, 100 Wash. 642, 171 Pac. 1037 (1918) and *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595 (1920).—E.S.

HOLCOMBE *v.* CREAMER

Supreme Judicial Court of Massachusetts. 1918.
231 Mass. 99; 120 N. E. 354.

The Massachusetts minimum-wage law of 1912 differed from most other state laws in that the wages set by the commission did not have to be observed if employers refused to do so. All the commission could do was to publish the names of employers failing to comply; the intention was, apparently, to bring the pressure of public opinion to bear upon recalcitrants. The fact that the law was not mandatory seems to have been a major

factor in the decision declaring it to be constitutional.

RUGG, C. J. . . . It is manifest . . . that the act is not mandatory as to rates of wages. It contains no words of compulsion upon either employer or employee. It does not restrain freedom of action by either employer or employee as to the

wages to be paid or received. . . . The chief purpose of the act as gathered from its words is that there shall be an investigation as to facts, a statement of the conclusions drawn from those facts and a making public of those conclusions, all by or under the supervision of an administrative board. The utmost authority of the commission is to make recommendations. It cannot issue any order. . . .

Doubtless one aim of the act is to bring to bear the force of public opinion in support of the acceptance of the recommendations of the commission. This may be a kind of coercion. But it can go no further than ascertained and published facts induce members of the public as individuals to the action of giving or withholding custom or patronage. The public money could not be expended for the support of the commission unless its functions related to a public as distinguished from a private matter. It hardly can be pronounced a matter utterly devoid of common interest to ascertain whether and

to what extent substantial numbers of working women are receiving wages "inadequate to supply the necessary cost of living and to maintain the worker in health." Restraint upon freedom of contract by women and children has been recognized as an appropriate exercise of the police power in numerous cases. . . . The kind of constraint, which may arise from making public facts and conclusions at the expense of the Commonwealth, would involve other considerations if directed to affairs in which there could be no legitimate general interest directed to the rational promotion of the public health, order, morals and in a restricted sense the common welfare. . . .

Since the statute is not compulsory either in form or effect, there is no ground for holding that it is invalid because not affording equal protection of the laws. Whatever might be said about certain provisions of the act in this regard, if it were mandatory, there is no occasion now to discuss the matter. . . .

STETTLER *v.* O'HARA

Supreme Court of Oregon. 1914.
69 Ore. 519; 139 Pac. 743.

MR. JUSTICE EAKIN delivered the opinion of the court. . . .

[This case concerns the constitutionality of the Oregon law providing for the fixing of minimum wages for women.]

. . . The entry of woman into the realm of many of the employments formerly filled by man, in which she attempts to compete with him, is a recent innovation, and it has created a condition which the legislatures have deemed it their duty to investigate, and to some extent to govern. It is conceded by all students of the subject, and they are many and their writings extensive, that woman's physical structure and her position in the economy of the race renders her incapable of competing

with man either in strength or in endurance. . . .

In many of the states as well as in foreign countries special study and investigation have been given to this question as to the effect of long hours of labor and inadequate wages upon the health, morals and welfare of woman, with a view to remedy the evil results as far as possible. There seems to be a very strong and growing sentiment throughout the land, and a demand, that something must be done by law to counteract the evil effects of these conditions. . . .

[JUSTICE EAKIN then discussed the decisions affirming the constitutionality of hours laws for women and the statements

of authorities on the wisdom of such regulation.]

. . . With this common belief . . . the court cannot say, beyond all question, that the act is a plain, palpable invasion of rights secured by the fundamental law, and has no real or substantial relation to the protection of public health, the public morals or public welfare. Every argument put forward to sustain the maximum hours law, or upon which it was established, applies equally in favor of the constitutionality of the minimum wage law as also within the police power of the state and as a regulation tending to guard the public morals and the public health. . . .

This decision, upholding the constitutionality of minimum wage laws for women, was appealed to the United States Supreme Court. In the meantime, Louis D. Brandeis, who had prepared the brief on behalf of the state of Oregon, had been appointed an associate

justice of the United States Supreme Court. He could not, therefore, with propriety participate in deciding the appeal. The other eight justices divided evenly on the question, without writing opinions. The effect of this 4 to 4 vote was to sustain the ruling of the Oregon supreme court. 243 U. S. 629 (1917).

After the tie vote in the United States Supreme Court in the *Stettler* case, it was generally supposed that minimum-wage laws were constitutional. This view was rudely upset by the decision in the *Adkins* case, which held unconstitutional the District of Columbia minimum-wage law. Had Justice Brandeis felt free to vote in the *Stettler* case, he certainly would have voted in favor of constitutionality and the decision would then have had the force of a clear precedent. The tie vote, however, made it much easier for those opposing constitutionality to ignore the *Stettler* case. The decision in the *Adkins* case is to be explained partly in terms of the post-war hostility to labor legislation and, even more, to the changed personnel of the Supreme Court; between 1917 and 1923 some very conservative justices, notably Justice Sutherland, had been appointed to the court.

ADKINS v. CHILDREN'S HOSPITAL

Supreme Court of the United States. 1923.
261 U. S. 525; 43 Sup. Ct. 394; 67 L. Ed. 784.

In 1918, Congress passed a law providing for the fixing of minimum wages for women and children in the District of Columbia. Employers who opposed the law arranged to have test cases brought in a lower court of the District. They said that the law was unconstitutional because it restricted unduly the liberty of contract both of employing companies and of workers. An employer and a worker sued, each asking that, to protect his property, the court issue an injunction forbidding the enforcement of the law. The court held the law constitutional, and so did the appeals court. However, one of the three appeals judges dissented, and later did the rather unusual thing of joining with another judge, who now returned after an illness, to reopen the case and hold the law void. The government appealed to the United States Supreme Court.

* * * *

MR. JUSTICE SUTHERLAND delivered the opinion of the Court. . . .

The appellee in the first case is a corporation maintaining a hospital for children in the District. It employs a large number of women in various capacities, with whom it had agreed upon rates of wages and compensation satisfactory to such employees, but which in some instances were less than the minimum wages fixed by an order of the board made in pursuance of the act. The women with whom appellee had so contracted were all of full age and under no legal disability. . . .

In the second case the appellee, a woman twenty-one years of age, was employed by the Congress Hall Hotel Company as an elevator operator, at a salary of \$35

per month and two meals a day. She alleges that the work was light and healthful, the hours short, with surroundings clean and moral, and that she was anxious to continue it for the compensation she was receiving and that she did not earn more. Her services were satisfactory to the Hotel Company and it would have been glad to retain her but was obliged to dispense with her services by reason of the order of the board and on account of the penalties prescribed by the act. The wages received by this appellee were the best she was able to obtain for any work she was capable of performing and the enforcement of the order, she alleges, deprived her of such employment and wages. She further averred that she could not secure any other position at which she could make a living, with as good physical and moral surroundings, and earn as good wages, and that she was desirous of continuing and would continue the employment but for the order of the board. . . .

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question. . . . Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining. . . .

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the

present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest.

(1) *Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest.* . . .

(2) *Statutes relating to contracts for the performance of public work.* . . .

(3) *Statutes prescribing the character, methods and time for payment of wages.* . . .

(4) *Statutes fixing hours of labor.* It is upon this class that the greatest emphasis is laid in argument and therefore, and because such cases approach most nearly the line of principle applicable to the statute here involved, we shall consider them more at length. . . .

In the *Muller Case* the validity of an Oregon statute, forbidding the employment of any female in certain industries more than ten hours during any one day was upheld. The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. . . . But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case* (p. 421), has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. . . .

The essential characteristics of the stat-

ute now under consideration, which differentiate it from the laws fixing hours of labor, will be made to appear as we proceed. It is sufficient now to point out that the latter, as well as the statutes mentioned under paragraph (3), deal with the incidents of the employment having no necessary effect upon the heart of the contract, that is, the amount of wages to be paid and received. A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages. Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long-continued duration is detrimental to health. . . .

[The present statute] is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee. The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment; and, while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources she

may have. It is based wholly on the opinions of the members of the board and their advisers—perhaps an average of their opinions, if they do not precisely agree—as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals. It applies to any and every occupation in the District, without regard to its nature or the character of the work.

The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy. What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so. The amount will depend upon a variety of circumstances: the individual temperament, habits of thrift, care, ability to buy necessities intelligently, and whether the woman live alone or with her family. To those who practice economy, a given sum will afford comfort, while to those of contrary habit the same sum will be wholly inadequate. The coöperative economies of the family group are not taken into account though they constitute an important consideration in estimating the cost of living, for it is obvious that the individual expense will be less in the case of a member of a family than in the case of one living alone. The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages; and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis. No distinction can be made between women who work for others and those who do

not; nor is there ground for distinction between women and men, for, certainly, if women require a minimum wage to preserve their morals men require it to preserve their honesty. For these reasons, and others which might be stated, the inquiry in respect of the necessary cost of living and of the income necessary to preserve health and morals, presents an individual and not a composite question, and must be answered for each individual considered by herself and not by a general formula prescribed by a statutory bureau.

This uncertainty of the statutory standard is demonstrated by a consideration of certain orders of the board already made. These orders fix the sum to be paid to a woman employed in a place where food is served or in a mercantile establishment, at \$16.50 per week; in a printing establishment, at \$15.50 per week; in a laundry, at \$15 per week, with a provision reducing this to \$9 in the case of a beginner. If a woman employed to serve food requires a minimum of \$16.50 per week, it is hard to understand how the same woman working in a printing establishment or in a laundry is to get on with an income lessened by from \$1 to \$7.50 per week. The board probably found it impossible to follow the indefinite standard of the statute, and brought other and different factors into the problem; and this goes far in the direction of demonstrating the fatal uncertainty of the act, an infirmity which, in our opinion, plainly exists.

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and

imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of

the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment, are the same when there is not employment, and as great in one occupation as in another. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be

so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States. . . .

It is said that great benefits have resulted from the operation of such statutes, not alone in the District of Columbia but in the several States, where they have been in force. A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of this statement, all of which we have found interesting but only mildly persuasive. That the earnings of women now are greater than they were formerly . . . may be . . . due to other causes.

Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If, in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. If, for example, in the opinion of future lawmakers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains the minimum wage will be invoked to support a maximum wage

for building laborers and artisans, and the same argument which has been here urged to strip the employer of his constitutional liberty of contract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself: it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other. . . .

It follows from what has been said that the act in question passes the limit prescribed by the Constitution, and, accordingly, the decrees of the court below are
Affirmed.

MR. JUSTICE BRANDEIS took no part in the consideration or decision of these cases.

MR. CHIEF JUSTICE TAFT, dissenting.

I regret much to differ from the Court in these cases. . . .

Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound. . . .

. . . I assume that the conclusion in this

case rests on the distinction between a minimum of wages and a maximum of hours in the limiting of liberty to contract. I regret to be at variance with the Court as to the substance of this distinction. In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand.

If it be said that long hours of labor have a more direct effect upon the health of the employee than the low wage, there is very respectable authority from close observers, disclosed in the record and in the literature on the subject quoted at length in the briefs, that they are equally harmful in this regard. Congress took this view and we can not say it was not warranted in so doing.

With deference to the very able opinion of the Court and my brethren who concur in it, it appears to me to exaggerate the importance of the wage term of the contract of employment as more inviolate than its other terms. Its conclusion seems influenced by the fear that the concession of the power to impose a minimum wage must carry with it a concession of the power to fix a maximum wage. This, I submit, is a *non sequitur*. A line of distinction like the one under discussion in this case is, as the opinion elsewhere admits, a matter of degree and practical experience and not of pure logic. Certainly the wide difference between prescribing a minimum wage and a maximum wage could as a matter of degree and experience be easily affirmed. . . .

I am authorized to say that MR. JUSTICE SANFORD concurs in this opinion.

MR. JUSTICE HOLMES, dissenting. . . .

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirements of health and

right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short, the law in its character and operation is like hundreds of so-called police laws that have been upheld. I see no greater objection to using a Board to apply the standard fixed by the act than there is to the other commissions with which we have become familiar, or than there is to the requirement of a license in other cases. . . .

The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly cannot be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria and a number of the States of this Union. The belief is fortified by a very remarkable collection of documents submitted on behalf of the appellants, material here, I conceive, only as showing that the belief reasonably may be held. In Australia the power to fix a minimum for wages in the case of industrial disputes extending beyond the limits of any one State was given to a Court, and its President wrote a most interesting account of its operation. 29 Harv. Law Rev. 13. If a legislature should adopt what he thinks the doctrine of modern economists of all schools, that "freedom of contract is a misnomer as applied to a contract between an employer and an ordinary individual employee," *ibid.* 25, I could not pronounce an opinion with which I agree impossible to be entertained by reasonable men. If the same legislature should accept his further opinion that industrial peace was best attained by the device of a Court having the above powers, I should not feel myself able to contradict it, or to deny that the end justified restrictive legislation quite as adequately as beliefs concerning Sunday or exploded theories about usury. I should have my doubts, as I have them about this statute—but they would be whether the

bill that has to be paid for every gain, although hidden as interstitial detriments, was not greater than the gain was worth: a matter that it is not for me to decide.

I am of opinion that the statute is valid and that the decree should be reversed.

* * * *

Following the decision in the *Adkins* case, it was generally held that state minimum-wage laws were unconstitutional. Thus the United States Supreme Court invalidated the Arizona law in *Murphy v. Sardell*, 269 U. S. 530, 46 Sup. Ct. 22 (1925), and the Arkansas law in *Donham v. West-Nelson Mfg. Co.*, 273 U. S. 657, 47 Sup. Ct. 344 (1927). The Wisconsin law was held unconstitutional by a lower federal court in *Folding Furniture Works, Inc. v. Industrial Commission*, 300 Fed. 991 (1924). That the *Adkins* ruling was followed reluctantly in some cases is indicated in the decision of the Kansas Supreme Court in *Topeka Laundry Co. v. Court of Industrial Relations*, 119 Kan. 12, 237 Pac. 1041 (1925), declaring the state minimum-wage law unconstitutional. In its opinion, the Court said:

Whether or not social and economic conditions in the state of Kansas in fact demanded enactment of the minimum-wage law is not a judicial question. The legislature was constituted to determine whether the general welfare would be promoted by such a measure, and any reasonable basis of fact is sufficient to satisfy constitutional requirement. Likewise, whether social and economic conditions have been bettered by enactment of the law is not a judicial question. The questions are, whether the statute is embraced within the legislature's constitutional power to enact laws relating to the general welfare, and if so, whether the means employed have any reasonable relation to accomplishment of the legislative purpose. If the court were free to exercise its independent judgment, it would answer these questions in the affirmative, and would hold that the statute and the orders made pursuant to it would be valid. The court is not free, however, to deal with the subject independently. The supreme court of the United States is final interpreter of the constitution of the United States. Its decisions interpreting the constitution are binding on this court and the decision . . . holding the minimum-wage act of congress for the District of Columbia to be violative of the fifth amendment to the constitu-

tion of the United States makes it necessary for this court to declare the minimum-wage law of this state to be void as contravening the fourteenth amendment.

State minimum-wage legislation was thus brought to a halt by the *Adkins* decision, for it was plain that the U. S. Supreme Court would invalidate any other law which came before it. Even the Massachusetts law, which

probably was constitutional because of its voluntary character, was weakened by a ruling of the Supreme Judicial Court in *Commonwealth v. Boston Transcript Co.*, 249 Mass. 477, 144 N. E. 400 (1924) that the provision of the Act compelling newspapers to publish decisions of the minimum-wage commission giving names of employers who did not conform to the wage orders was unconstitutional.

STATE LEGISLATION SINCE 1933.¹

The impact of the depression revived interest in minimum-wage laws. In the years after 1929 wage rates had fallen to very low levels and there was a widespread feeling, typified by Donald Richberg's statement quoted above (p. 426) that raising wages would stimulate purchasing power and lead to industrial recovery.

Only nine state minimum-wage laws were still in existence at the beginning of 1933, and these, as we have noted, were generally ineffective and unenforced. During 1933, however, Connecticut, Illinois, New Hampshire, New Jersey, New York, Ohio, and Utah passed new minimum-wage laws.

* * * *

Of these, all but Utah based their laws on a standard bill sponsored by the National Consumers' League which had been drawn in such a way as to overcome the objection raised in the *Adkins* decision. The standard bill does not attempt to regulate wages generally. It provides that, whenever a substantial number of women and minors are receiving less than a subsistence wage, an investigation shall be made to determine whether the wages are "fairly and reasonably commensurate with the value of the service or class of service rendered." An

unreasonable wage is defined as "less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." A similar law was passed by Massachusetts in 1934, and by Rhode Island in 1936.

In the Utah law, the State industrial commission is empowered to ascertain the wages paid, the hours, and conditions of labor in the various occupations. Upon investigation, if it is determined that the wages paid "are inadequate to supply the cost of proper living," the law provides that the commission shall call a "wage board" into conference. After a public hearing, the commission is empowered to fix a minimum-wage, a maximum number of hours, and the standard conditions of labor "demanded by the health and welfare of the women and minors engaged in any occupation." A mandatory order may be subsequently issued setting forth the minimum-wage and the maximum hours. The constitutionality of this law was recently upheld by the State supreme court in the case of *McGrew v. Industrial Commission* (85 Pac. (2d) 608).¹

¹ "Minimum-Wage Legislation as of Jan. 1, 1940," *Monthly Labor Review* (Apr. 1940), pp. 891-909.—E.S.

MOREHEAD *v.* NEW YORK *ex rel.* TIPALDO

Supreme Court of the United States. 1936.
298 U. S. 587; 56 Sup. Ct. 918; 80 L. Ed. 1347.

The New York law of 1933 was soon challenged as a violation of the due process clauses of the state and the federal constitutions. The state Court of Appeals held the law unconstitutional on the ground that it was not materially different from the District of Columbia law which had been invalidated in the *Adkins* case. From the Court of Appeals, an appeal was taken to the United States Supreme Court.

* * * *

MR. JUSTICE BUTLER delivered the opinion of the Court. . . .

The *Adkins* case, unless distinguishable, requires affirmance of the judgment below. The petition for the writ sought review upon the ground that this case is distinguishable from that one. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which the decision rests are not challenged. This court confines itself to the ground upon which the writ was asked or granted. . . . Here the review granted was no broader than that sought by the petitioner. . . . He is not entitled and does not ask to be heard upon the question whether the *Adkins* case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar. . . .

. . . It appears: The minimum wage provided for in the District Act was one not less than adequate "To supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals." The New York Act defines an oppressive and unreasonable wage as containing two elements. The one first mentioned is: "less than the fair and reasonable value of the services rendered." The other is: "less than sufficient to meet the

minimum cost of living necessary for health." The basis last mentioned is not to be distinguished from the living wage defined in the District Act. The exertion of the granted power to prescribe minimum wages is by the State act conditioned upon a finding by the commissioner or other administrative agency that a substantial number of women in any occupation are receiving wages that are oppressive and unreasonable, i. e., less than value of the service and less than a living wage. That finding is essential to jurisdiction of the commissioner. In the state court there was controversy between the parties as to whether the "minimum fair wage rates" are required to be established solely upon value of service or upon that value and the living wage. Against the contention of the attorney general, the Court of Appeals held that the minimum wage must be based on both elements.

Speaking through its chief justice, that court said: "We find no material difference between the act of Congress and this act of the New York State Legislature. . . ."

The petitioner does not suggest and reasonably it cannot be thought that, so far as concerns repugnancy to the due process clause, there is any difference between the minimum wage law for the District of Columbia and the clause of the New York Act, "less than sufficient to meet the minimum cost of living necessary for health." Petitioner does not claim that element was validated by including with it the other ingredient, "less than the fair and reasonable value of the services rendered."

His brief repeats the state court's declaration: "The act of Congress had one standard, the living wage; this State act

has added another, reasonable value. *The minimum wage must include both.* What was vague before has not been made any clearer. *One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act.'*" Then he says: "The italicized lines carry the Court's misconception of the statute. It is a basic misconception. From it flows the erroneous conclusion of the Court of Appeals that there exists no material difference between the two statutes. . . . Those two factors *do not* enter into the determination of the minimum '*fair wage*' as in the statute defined, nor as determined in this case. The only basis for evaluating and arriving at the '*fair minimum wage*' is the fair value of the services rendered."

There is no blinking the fact that the state court construed the prescribed standard to include cost of living or that petitioner here refuses to accept that construction. Petitioner's contention that the Court of Appeals misconstrued the Act cannot be entertained. This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider the petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. . . .

. . . The standard of "minimum fair wage rates" for women workers to be prescribed must be considered as if both elements—value of service and living wage—were embodied in the statutory definition itself. . . . As our construction of an Act of congress must be deemed by state courts to be the law of the United States, so this New York Act as construed by her court of last resort, must here be taken to express the intention and purpose of her lawmakers. . . .

The state court rightly held that the

Adkins case controls this one and requires that relator be discharged upon the ground that the legislation under which he was indicted and imprisoned is repugnant to the due process clause of the Fourteenth Amendment.

The general statement in the New York Act of the fields of labor it includes, taken in connection with the work not covered, indicates legislative intention to reach nearly all private employers of women. . . .

Upon the face of the act the question arises whether the State may impose upon the employers state-made minimum wage rates for all competent experienced women workers whom they may have in their service. That question involves another one. It is: Whether the State has power similarly to subject to state-made wages all adult women employed in trade, industry or business, other than house and farm work. These were the questions decided in the *Adkins* case. So far at least as concerns the validity of the enactment under consideration, the restraint imposed by the due process clause of the Fourteenth Amendment upon legislative power of the State is the same as that imposed by the corresponding provision of the Fifth Amendment upon the legislative power of the United States. . . .

The decision [in the *Adkins* case] and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid. . . .

Petitioner does not attempt to support the Act as construed by the state court. His claim is that it is to be tested here as if it did not include the cost of living and as if value of service was the sole standard. Plainly that position is untenable. If the State has power to single out for regulation the amount of wages to be paid women, the value of their

services would be a material consideration. But that fact has no relevancy upon the question whether the State has any such power. And utterly without significance upon the question of power is the suggestion that the New York prescribed standard includes value of service with cost of living whereas the District of Columbia standard was based upon the latter alone. As shown above, the dominant issue in the *Adkins* case was whether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid was an additional ground of subordinate consequence. . . .

The New York court's decision conforms to ours in the *Adkins* case, and the later rulings that we have made on the authority of that case. That decision was deliberately made upon careful consideration of the oral arguments and briefs of the respective parties and also of briefs submitted on behalf of states and others as amici curiae. In the Arizona case the attorney general sought to distinguish the District of Columbia Act from the legislation then before us and insisted that the latter was a valid exertion of the police power of the State. Counsel for the California commission submitted a brief amicus curiae in which he elaborately argued that our decision in the *Adkins* case was erroneous and ought to be overruled. In the Arkansas case the state officers, appellants there, by painstaking and thorough brief presented arguments in favor of the same contention. But this court, after thoughtful attention to all that was suggested against that decision, adhered to it as sound. And in each case, being clearly of opinion that no discussion was required to show, that having regard to the principles applied in the *Adkins* case, the state legislation fixing wages for women was repugnant to the due process

clause of the Fourteenth Amendment, we so held and upon the authority of that case affirmed per curiam the decree enjoining its enforcement. It is equally plain that the judgment in the case now before us must also be affirmed.

Chief Justice Hughes, in a dissenting opinion concurred in by Justices Brandeis, Stone, and Cardozo, held that the New York law was not the same as the District of Columbia law which was the subject of the *Adkins* decision. The inclusion of the value of the services as a factor to be considered in fixing the wage rate gave the New York law a distinctive character. When considered apart from the *Adkins* decision, and in light of the facts about the employment of women which guided the legislature in passing the law, the law, in the opinion of the Chief Justice, was constitutional.

Justice Stone, in a separate dissent concurred in by Justices Brandeis and Cardozo, went much further. To him, the question of whether or not the New York law was like the District of Columbia law was immaterial. He affirmed the right of a state to pass minimum-wage laws for women and declared that nothing in the Fourteenth Amendment prevented legislative action in a matter affecting the public welfare. Because this minority view became the majority view within one year, we include here excerpts from Justice Stone's dissent.

MR. JUSTICE STONE, dissenting.

While I agree with all that the Chief Justice has said, I would not make the differences between the present statute and that involved in the *Adkins* case the sole basis of decision. I attach little importance to the fact that the earlier statute was aimed only at a starvation wage and that the present one does not prohibit such a wage unless it is also less than the reasonable value of the service. Since neither statute compels employment at any wage, I do not assume that employers in one case, more than in the

other, would pay the minimum wage if the service were worth less.

The vague and general pronouncement of the Fourteenth Amendment against deprivation of liberty without due process of law is a limitation of legislative power, not a formula for its exercise. It does not purport to say in what particular manner that power shall be exerted. It makes no fine-spun distinctions between methods which the legislature may and which it may not choose to solve a pressing problem of government. It is plain too, that, unless the language of the amendment and the decisions of this Court are to be ignored, the liberty which the amendment protects is not freedom from restraint of all law or of any law which reasonable men may think an appropriate means for dealing with any of those matters of public concern with which it is the business of government to deal. There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together. But if this is freedom of contract no one has ever denied that it is freedom which may be restrained, notwithstanding the Fourteenth Amendment, by a statute passed in the public interest.

In many cases this Court has sustained the power of legislatures to prohibit or restrict the terms of a contract, including the price term, in order to accomplish what the legislative body may reasonably consider a public purpose. They include cases, which have neither been overruled nor discredited, in which the sole basis of regulation was the fact that circumstances, beyond the control of the parties, had so seriously curtailed the regulative power of competition as to place buyers or sellers at a disadvantage in the bargaining struggle, such that a legislature might reasonably have contemplated serious consequences to the community as a

whole and have sought to avoid them by regulation of the terms of the contract. . . .

No one doubts that the presence in the community of a large number of those compelled by economic necessity to accept a wage less than is needful for subsistence is a matter of grave public concern, the more so when, as has been demonstrated here, it tends to produce ill health, immorality and deterioration of the race. The fact that at one time or another Congress and the legislatures of seventeen states, and the legislative bodies of twenty-one foreign countries, including Great Britain and its four commonwealths, have found that wage regulation is an appropriate corrective for serious social and economic maladjustments growing out of inequality in bargaining power, precludes, for me, any assumption that it is a remedy beyond the bounds of reason. It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest.

If it is a subject upon which there is power to legislate at all, the Fourteenth Amendment makes no distinction between the methods by which legislatures may deal with it, any more than it proscribes the regulation of one term of a bargain more than another if it is properly the subject of regulation. No one has yet attempted to say upon what basis of history, principles of government, law or logic, it is within due process to regulate the hours and conditions of labor of women . . . and of men . . . and the time and manner of payment of the wage . . . but that the regulation of the amount of the wage passes beyond the constitutional limitation; or to say upon what theory the amount of a wage

is any the less the subject of regulation in the public interest than that of insurance premiums . . . or of the commissions of insurance brokers . . . or of the charges of grain elevators . . . or of the price which the farmer receives for his milk, or which the wage earner pays for it. . . .

In the years which have intervened since the *Adkins* case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation. I can perceive no more objection, on constitutional grounds, to their solution by requiring an industry to bear the subsistence cost of the labor which it employs, than to the imposition upon it of the cost of its industrial accidents. . . .

It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is to

be rendered impotent. The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs that it has adopted, in the name of liberty, the system of theology which we may happen to approve.

I know of no rule or practice by which the arguments advanced in support of an application for certiorari restrict our choice between conflicting precedents in deciding a question of constitutional law which the petition, if granted, requires us to answer. Here the question which the petition specifically presents is whether the New York statute contravenes the Fourteenth Amendment. In addition, the petition assigns as a reason for granting it that "the construction and application of the Constitution of the United States and a prior decision" of this Court "are necessarily involved," and again, that "the circumstances prevailing under which the New York law was enacted for a reconsideration of the *Adkins* case in the light of the New York act and conditions aimed to be remedied thereby." Unless we are now to construe and apply the Fourteenth Amendment without regard to our decisions since the *Adkins* case, we could not rightly avoid its reconsideration even if it were not asked. We should follow our decision in the *Nebbia* case and leave the selection and the method of the solution of the problems to which the statute is addressed where it seems to me the Constitution has left them, to the legislative branch of the government. The judgment should be reversed.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO join in this opinion.

WEST COAST HOTEL CO. *v.* PARRISH

Supreme Court of the United States. 1937.
300 U. S. 379; 57 Sup. Ct. 578; 81 L. Ed. 703.

One year after the *Morehead* decision, the Supreme Court ruled that state minimum-wage laws for women were not unconstitutional. This case involved the minimum-wage law of the state of Washington which had been on the statute books since 1913. In the *Morehead* case, the decision was 5 to 4 against constitutionality; in the *Parrish* case, it was 5 to 4 in favor of constitutionality of minimum-wage laws. The reversal was caused by the change in Justice Roberts' vote. His change of view may have been caused by the attack on the Supreme Court which President Roosevelt had launched, or it may have been due to a belief that, in the *Morehead* case, the issue was not whether minimum-wage laws were constitutional but whether the New York law was similar to the District of Columbia law. In any event, Chief Justice Hughes, writing the majority opinion in the *Parrish* case, said that in the *Morehead* case the Supreme Court had refused to re-examine the question of the constitutionality of minimum-wage laws but had restricted itself to the contention of the New York attorney general that the statute in question differed materially from that invalidated by the *Adkins* decision. In the *Parrish* case, on the other hand, the question of the constitutionality of minimum-wage laws was the one squarely before the court.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court. . . .

We think that the question which was not deemed to be open in the *Morehead* case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has

refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a reexamination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration. . . .

The Chief Justice proceeded to point out that the Washington law was challenged as a violation of the due process clause of the Fourteenth Amendment. He referred to the many other interferences with freedom of contract which had been upheld, especially in laws dealing with hours of labor and workmen's compensation, and stated that the Court had been particularly willing to justify interferences with freedom of contract where women were concerned. He also pointed out that the minority in the *Adkins* decision had challenged the validity of a distinction between minimum-wage laws and maximum-hours laws.

We think . . . that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. . . . What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the

exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adopted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which

arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. . . . This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. . . . Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case of *Adkins v. Children's Hospital, supra*, should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is affirmed.

MR. JUSTICE SUTHERLAND, dissenting:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, MR. JUSTICE BUTLER and I

think the judgment of the court below should be reversed. . . .

It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise. . . .

The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for and to convert what was intended as

inescapable and enduring mandates into mere moral reflections.

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution. . . .

[MR. JUSTICE SUTHERLAND then proceeded to restate the conclusions reached by the majority in the *Adkins* case, and concluded his dissent by saying:]

Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated, would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to become substantially the same, the right to make any contract in respect of wages will have been abrogated. . . .

DEVELOPMENTS AFTER THE *PARRISH* DECISION

As a result of minimum-wage legislation being held valid for women and minors by the United States Supreme Court, many States again considered legislation in this field. During 1937 four States (Arizona, Nevada, Oklahoma, and Pennsylvania) passed new minimum-wage laws, and two States (Massachusetts and New York) reenacted their statutes, while Colorado, Connecticut, Minnesota, and Wisconsin

passed amendatory legislation. In three jurisdictions (Arkansas, District of Columbia, and Puerto Rico), laws which had been on the statute books for many years without being enforced were revived and made effective. Kentucky and Louisiana enacted new minimum-wage laws in 1938; in Kansas the minimum-wage law which had been inoperative since 1925 was revived, and Massachusetts amended its law. In 1939, new minimum-wage laws were passed by the Legislatures of Alaska and Maine, and Massachusetts, Minnesota, Nevada, and

¹ "Minimum-Wage Legislation as of January 1, 1940," *Monthly Labor Review* (April, 1940), pp. 891-909.—E.S.

New York amended their laws. The Alaska law fixes the minimum wage; the Maine act is applicable only to the industry of packing fish and fish products in oil, mustard, or tomato sauce, and is of the "wage board" type.

Most of the minimum-wage laws apply only to women and minors and do not attempt to afford any protection to men. The first minimum-wage law to include men, as well as women and minors, was the Oklahoma law of 1937. The supreme court of that State, however, held this act void, insofar as it applied to wages for men, because of the insufficiency of the title of the act but declared that the invalidity of these provisions did not affect the validity of its regulation of the hours of labor of men and of the hours and wages of women.² Connecticut reenacted its law in 1939 so as to extend the provisions to men. The laws of Alaska and Nevada are applicable to women only.

With the exception of Arkansas, Nevada, South Dakota, Alaska, and Puerto Rico, where the minimum wages are fixed by law, the laws generally provide for the establishment of wage boards to investigate and recommend to the com-

mission or other organization authorized to administer the law, the minimum wage to be fixed for certain industries. Such agency may accept or reject the recommendation. The Arkansas law also empowers the industrial welfare commission, in case the wages fixed by law are too low or too high, to revise and adjust the wage in order to make it adequate to supply the necessary cost of living.

The laws of Arkansas, California, Colorado, Kansas, Louisiana, Minnesota, North Dakota, Oklahoma, Oregon, Utah, Washington, Wisconsin, and the District of Columbia make the cost of living the basis for determining wage rates, while the Connecticut, Illinois, Maine, New Hampshire, New Jersey, New York, and Ohio laws provide for establishing minimum-wage rates that are fairly and reasonably commensurate with the services rendered. Rhode Island also provides in its minimum-wage law for the latter means of setting a wage rate, and in addition permits the wage board to consider what wages the industry can afford to pay. In Arizona, Kentucky, Massachusetts, New York, and Pennsylvania the laws provide for a wage commensurate with the value of service rendered, and¹ allow the wage board, in determining a minimum wage, to consider the cost of living.

² *Associated Industries of Oklahoma v. Industrial Welfare Commission*, 90 Pac. (2d) 899; see also *Monthly Labor Review*, May 1939 (p. 1105).

WAGES ON STATE PUBLIC WORKS

Approximately three-fourths of the states have passed laws governing the rates of wages on public works construction. Some laws set a minimum rate, while others provide that the wages paid on public works shall be equal to the rate prevailing in the community in which the work is to be done. Though there has never been a real question as to the right of a state to fix wages for the people it employed directly, laws which have applied to municipalities and to contractors on public works have occasionally been challenged. In a number of early

cases,¹ various state courts invalidated laws on the ground that the state could not interfere with the contracts made by municipalities, municipalities being regarded as endowed with the same status as private corporations. Such views have given way to the attitude that states may set wage rates or provide for the payment of prevailing wages regardless of whether the work is done for

¹ See, e. g., *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716 (1901) and *Ryan v. City of New York*, 177 N. Y. 271, 69 N. E. 599 (1904).

the municipalities or for the states; *Atkin v. Kansas* (see below, pp. 506-508), in which state legislation on hours for public works

construction was upheld, has been used as an effective analogy for wage laws.

II. FEDERAL MINIMUM-WAGE LEGISLATION

The federal government was projected into the matter of minimum-wage legislation by the depression. Even before the 1932 election, it had been widely suggested that federal minimum-wage laws to prevent the continuance of the downward spiral of deflation and to increase consumers' purchasing power was a vital necessity. The Roosevelt administration was committed to this view, and within

a few months after President Roosevelt first took office, federal minimum-wage legislation became a reality with the establishment of the N. R. A. Up to May, 1935, when the Supreme Court, in the *Schechter* case, invalidated the N. R. A., federal control of wages completely overshadowed the laws passed by the states.

SCHECHTER POULTRY CORPORATION *v.* UNITED STATES

Supreme Court of the United States. 1935.
295 U. S. 495; 55 Sup. Ct. 837; 79 L. Ed. 1570.

The National Industrial Recovery Act, which became law on June 16, 1933, provided for the establishment of codes of fair competition for the various industries. These codes were to contain provisions for collective bargaining and were to fix minimum wages and maximum hours; they might also include regulations of marketing and productive activities.¹ In the *Schechter* case, the Act was challenged on the ground that (1) it involved an unconstitutional delegation by Congress of its legislative power, in that it failed to establish definite standards to govern industries in drawing up their codes and the president in approving them; (2) it deprived persons of their liberty and property without due process of law, thus violating the Fifth Amendment to the constitution, and (3) it regulated intrastate transactions which lay beyond Congress' power over interstate commerce. The Schechter Corporation was engaged in the live poultry business in New York City; it had been found guilty of violating the marketing and the labor provisions of the live poultry code.

- Chief Justice Hughes, writing the opinion,

asserted that the statute could not be justified as an emergency measure. "Extraordinary conditions do not create or enlarge constitutional power." He also said that the standards provided in the law were so vague and indefinite as to constitute an invalid delegation of Congress' legislative power. He then considered the applicability of federal power to the live poultry business in New York City.

* * * *

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court. . . .

The [constitutional] question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its

¹ To cover the period between the enactment of the law and the drawing up of the individual codes, President Roosevelt promulgated the President's Re-employment Agreement, the so-called "blanket code" which fixed a minimum wage of forty cents an hour for thirty-five hours a week for unskilled workers.
—E.S.

internal commerce. This appears from an examination of the considerations urged by the Government with respect to conditions in the poultry trade. Thus, the Government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that labor represents 50 to 60 per cent of these costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work, translates his saving into lower prices; that this results in demands for a cheaper grade of goods; and that the cutting of prices brings about a demoralization of the price structure. Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.

The Government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted from the States adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours. The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the estab-

lishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.

It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act,—the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities. Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting "the cumulative forces making for expanding commercial activity." Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution.

We are of the opinion that the attempt through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power. . . .

CARTER v. CARTER COAL CO.

Supreme Court of the United States. 1936.
298 U. S. 238; 56 Sup. Ct. 855; 80 L. Ed. 1160.

This decision in the *Schechter* case not merely brought about the end of the N. R. A., but also seemed to indicate that the Supreme Court would hold unconstitutional any federal wage-hour regulation applying to local industries which were not deemed to have a direct and immediate relation to interstate commerce. Nevertheless, almost immediately, in 1935, Congress passed the Bituminous Coal Conservation Act which provided for a "little N. R. A." in bituminous coal. Provision was made for a National Bituminous Coal Commission which was to supervise the organization of 23 coal districts, for each of which there was to be a code covering coal prices, wages, hours, and collective bargaining. The question whether the labor provisions of the act could be upheld as a valid exercise of Congress' power to regulate interstate commerce was one of the main issues when the scheme came before the Court.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court. . . .

We have seen that the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade." Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agree-

ments and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.

A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. *Schechter Corp. v. United States*, *supra*, p. 542 *et seq.* Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products. . . .

That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the preamble recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the *Schechter* case. . . . "If the commerce clause were construed," we there said, "to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the fed-

eral authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control." It was also pointed out, p. 548, that "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system."

Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word "direct" implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here, since that question is not—What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the *rela-*

tion between the activity or condition and the effect?

Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employees is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character. . . .

. . . The want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended. . . .

* *

Thus, the Court refused to distinguish between the *Schechter* case and the *Carter* case, holding in both that the federal commerce power did not extend to the fixing of hours, wages, and working conditions in so-called production industries.

PUBLIC WORKS AND PUBLIC CONTRACTS

Though the decisions in the *Schechter* and the *Carter* cases apparently barred federal regulation of wages in private industry, they did not cover wage rates on public works and public contracts. Several interesting laws have been passed by the Congress in these fields, the most important being the Bacon-Davis Act and the Walsh-Healey Act.

The Bacon-Davis Act,¹ originally enacted in 1931, was amended in 1935 and again in 1940. It is intended to compel the payment of prevailing rates of wages on public construction. Section 1 of the Act provides:

. . . The advertised specifications for every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair . . . of public buildings or public works of the United States or the District of Columbia . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village . . . in which the work is to be performed . . . and every contract . . . shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment. . . .

Other provisions of the law authorize the government to terminate contracts where the contractor has failed to observe the wage provisions, to withhold payments due to contractors to the extent necessary to reimburse workers who have been underpaid, and to bar violators of the law from bidding on federal contracts for a period of three years.

The Walsh-Healey Act,² or the Public Contracts Act, parallels the Bacon-Davis Act in the field of government contracts for materials, supplies, and equipment. It was passed

in 1936, evidently in the hope that even though the N. R. A. had been invalidated effective control over labor conditions could be exercised at least in work done on behalf of the government. Section 1 of the Act provides that:

. . . In any contract made . . . by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States . . . for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000, there shall be included the following representations and stipulations: . . .

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract. . . .

The Act also contains provisions for a maximum working period of eight hours a day and forty hours a week, for the prohibition of child labor and convict labor, and for the protection of workers against insanitary and hazardous working conditions. The same penalties are provided as in the Bacon-Davis Act with the additional provision that damages shall accrue to the United States at the rate of \$10 a day for each child or convict knowingly employed in the performance of the contract.

Strenuous protests were made by the steel industry against the Walsh-Healey Act, largely because some steel companies asserted that the minimum wage fixed by the Secretary of Labor was too high. The validity of the law was challenged, the matter finally coming before the U. S. Supreme Court in the case of *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 60 Sup. Ct. 869, 84 L. Ed. 743 (1940).

¹ 46 Stat. 1494, 49 Stat. 1101, Public No. 633—76th Congress.—E.S.

² Act of June 30, 1936, 49 Stat. 2036.—E.S.

In her finding, the Secretary of Labor had divided the country into six "localities" for the purposes of the Act and had set a minimum wage of 62½ cents an hour for the district or "locality" in question. The Lukens Company contended that the term "locality" as used in the Act should be defined in the manner prescribed by the Bacon-Davis Act: i. e., a political subdivision of a state, so that each town or village would constitute a "locality" instead of having merely the six divisions fixed by the Secretary. The company contended that the wage set was too high for many parts of the district or "locality" to which it was applied and likely to prevent the company from competing for government contracts. In his decision, Mr. Justice Black denied the right of the company to bring suit. The Act, he said, was intended to serve as a guide-post for governmental purchasing agents, and only the government had a right to complain of alleged misinterpretations or misapplications of the act:

Like private individuals and businesses, the Government enjoys the unrestricted power to

produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. . . .

The Act does not represent an exercise by Congress of regulatory power over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal. In both instances prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization. For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act. . . .

WAGES IN THE FAIR LABOR STANDARDS ACT (F. L. S. A.)

A new opportunity for federal legislation on minimum wages was presented by a series of decisions handed down by the Supreme Court in 1937. Both in the Social Security Act cases and in the National Labor Relations Act cases, the Court manifested a very liberal attitude. In the latter cases, particularly, the Court greatly expanded the power of Congress to regulate interstate commerce, holding that the commerce power extended to legislating on collective bargaining in manufacturing industries. This ruling seemed to clear the way for action on wages and hours, for all workers, male and female, engaged in the production of goods entering into interstate commerce.

In his annual message, delivered January 3, 1938, President Roosevelt urged the passage of a wages and hours law, saying, ". . . the people of this country, by an overwhelming vote, are in favor of having Congress—this Congress—put a floor below which industrial wages shall not fall, and a ceiling beyond which the hours of industrial labor shall not rise. . . .

"Wage and hour legislation, therefore, is a problem which is definitely before this Congress for action. It is an essential part of economic recovery. It has the support of an overwhelming majority of our people in every walk of life. . . ."

In accordance with this message, Congress passed the Fair Labor Standards Act of 1938, often referred to as the Wages and Hours Law.¹ This law contained provisions concerning child labor (see above pp. 406-407) and hours (see below p. 509), as well as wages. Following are section 2 of the Act, containing the declaration of policy, and sections 6 and 8(c), relating to the minimum-wage provisions.

FINDING AND DECLARATION OF POLICY

SEC. 2 (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of

¹ 52 Stat. 1060.—E.S.

goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(b) This section shall take effect upon

the expiration of one hundred and twenty days from the date of enactment of this Act.

* * * *

It will be noted that the law provided for a minimum of 25 cents an hour during the first year, of 30 cents an hour during the next six years, and of 40 cents an hour thereafter. The Administrator of the Wage and Hour Division was given the power to require higher minima than 25 cents or 30 cents (but not more than 40 cents) during the first seven years. To determine whether an industry could afford to pay higher than 25 or 30 cents, industry committees, consisting of equal numbers of representatives of employers, employees, and the public, were to be constituted and make recommendations to the Administrator; these recommendations were not, however, to be binding. Section 8(c) contains the principles to guide industry committees. Other provisions of the Act, important for the fixing of wages, are described a few pages below in the decision of the U. S. Supreme Court in the *Opp Cotton Mills* case.

* * * *

SEC. 8 . . . (c) The industry committee for any industry shall recommend such reasonable classifications for any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administra-

tor shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective

labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

UNITED STATES *v.* F. W. DARBY LUMBER COMPANY

Supreme Court of the United States. 1941.

312 U. S.—; 61 Sup. Ct. 451; 85 L. Ed. 395.

When the constitutionality of the F. L. S. A. came before the lower federal courts, it was very generally upheld. Among the cases reaching this result were *Bowie v. Claiborne*, 1 Labor Cases 1294 (1939); *Andrews v. Montgomery Ward & Co.*, 30 Fed. Supp. 380 (1939); *Emerson v. Mary Lincoln Candies, Inc.*, 17 N. Y. Supp. (2d) 851, 173 Misc. 531 (1940); *Opp Cotton Mills v. Administrator*, 111 Fed. (2d) 23 (1940); *Jacobs v. Peavy-Wilson Lumber Co., Inc.*, 33 Fed. Supp. 206 (1940); and *Morgan v. Atlantic Coast Line R. R.*, 32 Fed. Supp. 617 (1940).

In February, 1941, the U. S. Supreme Court by two sweeping decisions affirmed the constitutionality of the Act—in the *Darby Lumber* and *Opp Cotton Mills* cases.

* * *

MR. JUSTICE STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, *first*, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, *second*, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees in-

cluding those engaged "in the production and manufacture of goods to wit, lumber, for 'interstate commerce.'" . . .

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. . . .

The indictment charges that appellees are engaged, in the state of Georgia, in the business of acquiring raw materials, which they manufacture into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that they do in fact so ship a large part of the lumber so produced. There are numerous counts charging appellees with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellees have employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellees of workmen in the production of lumber for interstate commerce at wages of less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellees with failure to keep records showing

the hours worked each day a week by each of their employees as required by §11(c) and the regulation of the administrator, Title 29, Ch. 5, Code of Federal Regulations, Part 516, and also that appellees unlawfully failed to keep such records of employees engaged "in the production and manufacture of goods, to-wit lumber, for interstate commerce."

The demurrer, so far as now relevant to the appeal, challenged the validity of the Fair Labor Standards Act under the Commerce Clause and the Fifth and Tenth Amendments. The district court quashed the indictment in its entirety upon the broad grounds that the Act, which it interpreted as a regulation of manufacture within the states, is unconstitutional. It declared that manufacture is not interstate commerce and that the regulation by the Fair Labor Standards Act of wages and hours of employment of those engaged in the manufacture of goods which it is intended at the time of production "may or will be" after production "sold in interstate commerce in part or in whole" is not within the congressional power to regulate interstate commerce.

The effect of the court's decision and judgment are thus to deny the power of Congress to prohibit shipment in interstate commerce of lumber produced for interstate commerce under the proscribed substandard labor conditions of wages and hours, its power to penalize the employer for his failure to conform to the wage and hour provisions in the case of employees engaged in the production of lumber which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business and its power to compel him to keep records of hours of employment as required by the statute and the regulations of the administrator. . . .

The prohibition of shipment of the proscribed goods in interstate commerce. Section 15(a) (1) prohibits, and the indictment charges, the shipment in interstate

commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by §6 and §7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." *Gibbons v. Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. . . . It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, . . . stolen articles, . . . kidnapped persons, . . . and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. . . .

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation . . . but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours

within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution." . . . That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. . . .

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. . . .

The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some

constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden*, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart*, 247 U. S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . . The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of

its constitutional authority has long since ceased to have force. . . . And finally we have declared "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." . . .

The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Validity of the wage and hour requirements. Section 15(a)(2) and §§6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellees' employees are not alleged to be "engaged in interstate commerce" the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under §15(a)(2) as they were construed below, constitute "production for commerce" within the meaning of the statute. As the Government seeks to apply the statute in the indictment, and as the court below construed the phrase "produced for interstate commerce," it embraces at least the case where an employer engaged, as are appellees, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce. . . .

The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, . . . that the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exer-

cise of the granted power of Congress to regulate interstate commerce. . . .

While this Court has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. . . . In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. . . .

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. . . . A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. . . . But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.

In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act or whether they come within

the statutory definition of the prohibited Act as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce as it did in the present act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. . . .

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. . . .

We think also that §15(a)(2), now under consideration, is sustainable independently of §15(a)(1), which prohibits shipment or transportation of the proscribed goods. As we have said, the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair," as the

Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. . . .

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. . . .

The means adopted by §15(a)(2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. . . . Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. . . .

So far as *Carter v. Carter Coal Co.*, 298 U. S. 238, is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow. . . .

Our conclusion is unaffected by the Tenth Amendment. . . .

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. . . . Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the

National Labor Relations Act which we have cited. See also, *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 330-331; *Wright v. Union Central Ins. Co.*, 304 U. S. 502, 516.

Validity of the requirement of records of wages and hours. §15(a)(5) and §11(c). These requirements are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter. Since, as we have held, Congress may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. . . .

Validity of the wage and hour provisions under the Fifth Amendment. Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime. Since our decision in *West Hotel Co. v. Parrish*, 300 U. S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . . Similarly the statute is not objectionable because applied alike to both men and women. . . .

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. . . .

OPP COTTON MILLS, INC. *v.* ADMINISTRATOR

Supreme Court of the United States. 1941.

312 U. S.—; 61 Sup. Ct. 524; 85 L. Ed. 407.

In this case, the Court passed on, not only the constitutionality of the F. L. S. A., but also that of the whole machinery established by the Act for the determination of minimum wages by the industry committees and the Administrator of the Wage and Hour Division. Because the decision touched on many points of interpretation of the Act and of the Constitution, it is given here substantially complete.

MR. JUSTICE STONE delivered the opinion of the Court.

Three types of questions are presented by the petition for certiorari in this case:

First, whether the Fair Labor Standards Act of 1938, 52 Stat. 1060, is authorized by the Commerce Clause, violates the Tenth Amendment and the Due Process Clause of the Fifth Amendment and is an unconstitutional delegation of the legislative power of Congress to the Administrator of the Wage and Hour Division of the Department of Labor, appointed pursuant to §4(a) of the Act.

Second, whether an order of the Administrator prescribing a minimum wage in an industry is unauthorized by the statute and invalid because the procedure of the Administrator and an Industry Committee appointed by him pursuant to §5 of the Act, which resulted in the order, is unauthorized and violates the Fifth Amendment.

Third, whether the order of the Administrator is invalid because his findings on which the order is based are without the support of substantial evidence. The challenged findings are that the minimum wage established by the order will not substantially curtail employment, and that a classification within the industry is unnecessary for the purpose of fixing, for each classification within it, the highest minimum wage which will not substan-

tially curtail employment in such classification and will not give any competitive advantage to any group in the industry. . . .

We are here concerned with §5(a), §6(a)(4), and §8, under which the proceedings were had which resulted in the challenged order of the Administrator. These sections read together set up an administrative procedure for establishing a minimum wage in particular industries greater than the statutory minimum prescribed by §6, but not in excess of 40 cents an hour, such increase over the statutory minimum to be fixed for any industry subject to the Act by the Administrator in collaboration with an industry committee.

Section 5 provides, subsection (a), that the Administrator shall appoint an industry committee for each industry engaged in interstate commerce or in the production of goods for the commerce; that, subsection (b), the committee shall include persons representing the public, one of whom shall be designated as chairman, a like number representing employees in the industry, a like number representing employers in the industry, and directs that "In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on"; that, subsection (d), the Administrator shall submit to the committee from time to time available data on matters referred to it, shall cause to be brought before the committee in connection with such matters any witnesses whom he deems material, and that the committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

Section 6(a)(4) provides that at any

time after the effective date of the section the minimum wage shall be "not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8." Section 8(a) prescribes the procedure to be followed by the Administrator and industry committee in establishing the minimum wage authorized by §6(a)(4). It provides that with the view to carrying out the policy of the Act "by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry" subject to the Act, the Administrator "shall from time to time convene the industry committee for each such industry" which "shall . . . recommend the minimum rate or rates of wages to be paid under section 6 by employers" subject to the Act "in such industry or classifications therein."

Upon the Administrator's referring to the committee the question of minimum wage rates in an industry, §8(b) requires it to "investigate conditions in the industry," authorizes it or a subcommittee to "hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions" under the Act and requires the committee to "recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." Subsection (c) requires the committee for any industry to "recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in

the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification." It further directs that "no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

"(1) competitive conditions as affected by transportation, living, and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry."

By §8(d) after the industry committee files its report with the Administrator he, "after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section." Otherwise the Administrator is required to disapprove the recommendations of the committee and again refer the matter to the committee or to another committee for the industry which he may appoint for that purpose. Subsection (f) provides among other things that the wage orders of the Administrator "shall define the industries and classifications therein to which they are to apply" and subsection (g) provides that

"due notice of any hearing provided for in the section shall be given by publication in the Federal Register and by such other means as the administrator deems reasonably calculated to give general notice to interested persons."

As appears from his findings in support of the order, the Administrator, on September 13, 1938, appointed Industry Committee No. 1 for the textile industry, that industry being so defined by the order of appointment as to include the manufacture of cotton, silk, rayon and other products. Seven persons representing the public, seven representing employers in the industry, and seven representing employees were appointed to the Committee. Upon request of the Administrator at the Committee's first meeting in October, 1938, subcommittees were appointed for the purpose of considering precisely where the line should be drawn between the textile and some related industries not included in the definition adopted. Before the Committee concluded its deliberations on the recommended wage order the Administrator modified the definition in certain respects not now material.

At a meeting in December, 1938, the Committee heard witnesses and received briefs and memoranda from numerous interested parties. Statistical and economic studies by the Bureau of Labor Statistics in the Economic Section of the Wage and Hour Division had been previously submitted. The Committee then designated another subcommittee to gather additional information and hear such testimony as it deemed necessary to enable the Committee to arrive at a wage recommendation. This subcommittee obtained further economic data and heard additional witnesses including representatives of the American Association of Cotton Manufacturers of which petitioner is a member.

On March 21, 1939, after extended discussion and deliberation, the Committee,

by a vote of thirteen to six, adopted a resolution which fixed tentatively a minimum wage of 32½ cents an hour amounting to \$13 per forty-hour week or \$676 for 52 weeks, as the rate to be recommended to the Administrator. At this meeting the Committee rejected proposals to establish classifications in the industry and wage differentials among the classes. A subcommittee was appointed to draft a report, and on May 22nd and 23rd, after the Administrator had again modified the definition of the industry, the Committee again approved by the same vote as before the 32½ cents minimum wage. The report was accepted and signed, the minority filing two reports in opposition to the recommendation. The report detailed the proceedings of the Committee, analyzed the evidence and data upon which the Committee relied in making its recommendation, gave special consideration to the question whether the wage fixed would curtail employment in the industry generally and in the southern cotton mills in particular, and to the problem of classification. It concluded that "no reasonably efficient enterprise in the textile industry need fear the result of the modest wage standard recommended for the industry," and that the data before it "did not warrant any regional" or other "classification."

On May 27th the Administrator gave notice in the Federal Register which was also issued to the press and published in many newspapers, of a public hearing on the recommendations of the Committee. At the hearing which commenced on June 19, 1939, and was concluded on July 11th, more than 135 witnesses were heard, over 3,300 pages of testimony were taken and eight volumes of exhibits were submitted; oral arguments were heard by the Administrator on July 25th and written briefs were received until August 22, 1939. On September 29, 1939, the Administrator made his findings and order carrying into effect the recommendations

of the Committee, effective October 24, 1939, the date on which pursuant to §6(a) (2) a minimum wage of 30 cents per hour for all employees subject to the Act became effective.

The industry, as defined by the order, includes broadly the manufacture of yarns and fabrics of cotton and competing material such as rayon and silk, and of those finished products such as sheets, towels and napkins which are normally manufactured in the fabric weaving mills. The Administrator found that the basic considerations in determining which manufacturing processes were to be included within the definition were competitive interrelationships, convertibility of looms and the operations normally carried on by textile mills.

Although the Administrator was of opinion that the question of the composition of the Industry Committee was not properly before him for determination, he reviewed the evidence and concluded that the members had been chosen with due regard to the geographical regions in which the industry is carried on and that the Committee had considered the factors set forth in §8 of the Act and had reached its recommendation in accordance with law.

The Administrator found that the 32½ cent minimum wage would increase the average wage bill for the textile industry as a whole 4 per cent over the 25 cent minimum in effect before October 24, 1939, and 2.1 per cent over the 30 cent minimum in effect thereafter and that the wage increases in the southern portion of the industry would be 6.25 per cent and 2.15 per cent over the 25 and 30 cent minimum respectively. He further found that since the average labor costs do not constitute over 36 per cent of production costs the minimum wage increase would increase production costs slightly over one-third of the percentages of wage increases just indicated, and that the increase in production costs would not result in such

a rise in prices to ultimate consumers of the finished product as to decrease consumer demand.

From all this he drew the conclusion that there would be no substantial curtailment of employment in the industry as a whole or in its southern branch as a result of the increased wage. In the case of small cotton mills in the south employing only 7 per cent of the southern cotton textile workers (5 per cent of all in the entire cotton industry), paying the lowest wages, he concluded that the new minimum rate as contrasted with the 30 cent statutory rate would raise manufacturing costs more than the 1.94 per cent average, and for these mills the increase would range from 2.77 per cent to 3.75 per cent. The Administrator found that curtailment of employment even in the mills paying the lowest wages would be dependent on total cost and the technological and general efficiency of each mill, and that low wages do not necessarily coincide with a low degree of efficiency. The Administrator found generally that the small southern mills are not necessarily marginal or the least profitable and that, accepting the figures submitted by the group of small mills opposing the 32½ cent minimum, the increase in labor costs for such mills would be 13.5% and only 4 per cent in total manufacturing cost over the 25 cent minimum. The increase over the 30 cent minimum would be slightly over one-third of these percentages. The Administrator also found that a modernization program in these mills would displace only a small number of employees. From these and other facts detailed in the findings, the Administrator concluded that there would be no substantial curtailment of employment even in the group of small mills.

The Administrator also considered the factors for determining whether classification should be made for wage differentials within the industry. After exam-

ining numerous studies of living costs made by the Bureau of Labor Statistics of the Department of Labor he concluded that the costs of living in the north exceeds that in the south by about 4.6% on the average, and that the differences in costs between cities in each region greatly exceed the difference between the two regions as a whole. He accordingly concluded that living costs do not vary substantially or uniformly between regions and do not affect competitive conditions in the industry. He found that northern mills had an advantage with respect to transportation costs in shipping to the New England states, but southern mills had an advantage in shipping to the middle west and south, having a great population; that many northern finishing mills receive unfinished cloth from southern factories and thus bear the disadvantage in freight rates from the south to northern finishing mills and that on an average the south has a slight transportation advantage with respect to cotton coming to the mills there. He concluded that even with the average freight rates in the south somewhat higher than the north, on the whole the advantages and disadvantages in transportation costs in the two regions were approximately in balance and that any remaining disadvantage was so small as not to affect competitive conditions appreciably.

After considering the proportion of obsolescent machinery in northern and southern mills, their taxes, efficiency of workers, power and construction costs and profits, the Administrator found that the southern mills were at least in a position of equality with northern mills in so far as these factors affect production costs, and that after the establishment of the 32½ cent minimum the prevailing minimum wages in the north would be considerably higher than in the south. He concluded that neither wage rates in collective labor agreements nor wages paid by employers maintaining voluntary

minimum wage standards required a classification within the industry, and finally he concluded that the Industry Committee's recommendations "are made in accordance with law, are supported by the evidence adduced at the hearing, and taking into consideration the same factors as are required to be considered by the Industry Committee, the prescribed 32½ cent wage will carry out the purposes of §8 of the Act."

Constitutionality of the Act. The objections that the sections of the Act imposing a minimum wage and maximum hours are not within the commerce power and infringes the Tenth and Fifth Amendments were discussed and disposed of in our opinion in No. 82, *United States v. Darby Lumber Co.*, *supra*. Since petitioner concedes that he is engaged in the manufacture of cotton goods for interstate commerce it is unnecessary to consider these contentions further here.

There remains the question whether the Act is an unconstitutional delegation of the legislative power of Congress. Petitioner urges that the standards prescribed for fixing the authorized minimum wages between 30 and 40 cents per hour are too vague and indefinite to admit of any judicial determination whether they are within or without the standards prescribed by Congress.

It is not seriously urged that the policy and standards of the statute are subject to these criticisms independently of the provisions relating to classification. Section 8 defines, with precision, the policy of the Act to raise the minimum wage to the 40 cents per hour limit "as rapidly as economically feasible without substantially curtailing employment" in each industry, and the standards of the administrative action applicable to the Administrator are those made applicable to the committee which it is provided "shall recommend to the Administrator the highest minimum wage rate for the industry which it determines, having due

regard to economic and competitive conditions, will not substantially curtail employment in the industry." But it is said that application of these standards in an industry is made contingent upon the determination whether the industry is to be classified and if so, whether it is to be subject to particular wage differentials, and that these determinations in turn depend upon factors so inadequately defined as to afford no standard of administrative action.

Committee and Administrator are required, as prerequisites for the classification, to determine that it will not give a competitive advantage to any group in the industry, and that the prescribed wage will not substantially curtail employment in each classification, and in making these determinations the committee and Administrator must consider "among other relevant factors," competitive conditions as affected by transportation, living and production costs, and the wage scale for comparable work established by collective bargaining labor agreements, and by employers who voluntarily maintain minimum wage standards in the industry.

It is urged that the statute does not prescribe the relative weight to be given to the specified factors or the other unnamed "relevant factors." It is said that this, with the further requirements that the prescribed wage is to be fixed with "due regard to economic and competitive conditions;" that the classification if made shall not "give a competitive advantage to any group in the industry," and that the prescribed wage must be one fixed "without substantially curtailing employment," leave the function which the committee and Administrator are to perform so vague and indefinite as to be practically without any Congressional guide or control.

The mandate of the Constitution that all legislative powers granted "shall be vested" in Congress has never been thought to preclude Congress from re-

sorting to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of congressional policy, have been made prerequisite to the operation of its statutory command. The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitutional sense, of the legislation function.

True, the appraisal of facts in the light of the declared policy and in conformity to prescribed legislative standards, and the inferences to be drawn by the administrative agency from the facts, so appraised, involve the exercise of judgment within the prescribed limits. But where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function.

While fact finding may be and often is a step in the legislative process, the Constitution does not require that Congress should find for itself every fact upon which it bases legislation. . . . In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate or the rate of wages to be applied in particular industries by a minimum wage law. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative

policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.

The present statute satisfies those requirements. The basic facts to be ascertained administratively are whether the prescribed wage as applied to an industry will substantially curtail employment, and whether to attain the legislative end there is need for wage differentials applicable to classes in industry. The factors to be considered in arriving at these determinations, both those specified and "other relevant factors," are those which are relevant to or have a bearing on the statutory objective. The fact that Congress accepts the administrative judgment as to the relative weights to be given to these factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases, is no more an abandonment of the legislative function than when Congress accepts and acts legislatively upon the advice of experts as to social or economic conditions without reexamining for itself the data upon which that advice is based. . . .

The procedure before the Industry Committee. The procedure before the Committee is assailed upon three principal grounds: that the changes in definition of the textile industry made after the appointment of the Committee rendered the order of appointment void; that the order defining the industry is also invalid because the Administrator placed the woolen industry in a different industry under a different Committee, rather than in the textile industry including cotton, silk and rayon; and that the Committee was not properly constituted under the

statute because the Administrator in selecting it did not give "due regard to the geographical regions in which the industry is carried on." Certain procedures before the Committee are also challenged because they are said to be unauthorized or contrary to the statute or to the requirements of due process.

At the outset the distinct separation of the functions to be performed by the committee under §8(a), (b), (c), (d), from that to be performed by the Administrator after submission of the committee's report, is to be noted. The committee is required to be composed of equal numbers of representatives of the public, of the employers and of the employees in the industry, selected with due regard to geographical considerations. It acts as an investigating body with the duty to report its recommendations to the Administrator. Its report is the basis of the proceedings before the Administrator under §8(d) which are judicial in character, with provisions for notice and full hearing. The issue to be determined by the Administrator upon the hearing is whether the recommendations of the committee "are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section." Review of the Administrator's order fixing a wage is had under §10 by petition to the circuit court of appeals on the record made before the Administrator. Thus under the provisions of §8(d) no wage is fixed which is not recommended by the committee, and not then without appropriate hearing, findings and order by the Administrator.

As already stated the Administrator's order of September 13, 1938, setting up the Industry Committee, defined the industry so as to include the manufacture of a variety of cotton, silk and rayon products, including those made by petitioner,

and throughout the proceedings his product was so included. On recommendation of the Committee two changes in the definition were made with reference to the inclusion and exclusion of products which were near the borderline of the definition before the amendment. December 19, 1938, the order was amended so as to exclude knitted fabrics and to include other products such as blankets and sheets. A second amendment ordered by the Administrator on May 22, 1939, just before the Committee adopted its report, added to the Industry the manufacture of mixed products containing not more than 45 per cent wool.

In all this we can find no failure to comply with the statute. Section 5(a) directs that "the Administrator shall, as soon as practicable, appoint an industry committee for each industry" subject to the Act. But it does not direct a final definition of the industry to be made before the committee meets and such a requirement plainly would not comport with the purposes of the Act. Section 8(f) provides that orders of the Administrator "issued under this section" which are the final orders fixing a wage "shall define the industries and classifications therein to which they are to apply." So far as the definition is open to attack, it is upon the record made before the Administrator if it there appears that the definition does not conform to the statute, or that the recommendations of the committee were based on a different definition of the industry from that finally made and so do not support an order for the industry as defined.¹ But subject to these requirements which insure that recommendations of the committee and the order of the Administrator are based on the same definition of the industry, there is no provision of the statute preventing

amendment of the definition while the matter is pending before the committee and no purpose or policy of the Act which would be served by precluding such amendments so long as the report of the committee is based on the amended definition. It is to the advantage of the administration of the Act that the completeness and accuracy of the definition should be reexamined and the definition revised with the aid of the committee at any time before its report is submitted. We find nothing in the statute to prevent it.

Section 3(h) defines "Industry" as meaning "industry or branch thereof or group of industries." In defining the textile industry and in fixing for it a wage which with due regard to "economic and competitive conditions" will not substantially curtail employment in the industry it was appropriate for the Administrator to take into account competitive conditions. In defining the industry the Administrator took into account the competitive interrelationship of the fabrics included and the interchangeability of the looms employed in producing them; and in excluding the woollen industry he took account of its competitive relationships with the products included and the different nature of the establishments, labor forces and wage structures associated with the two types of product. We cannot say that in so doing he transgressed any provision of the statute. Nor can we say that in applying these tests he departed from its purpose. The inclusion of a given product in one industry or another, where both are subject to the Act, principally concerns convenience in administering the Act. For the provision for classification with appropriate wage differentials affords ample opportunity for fixing an appropriate wage with respect to any product whether it is placed in one industry or another. There is no serious contention and we find no basis for saying that the evidence does not support

¹ Here the Committee reconsidered its report, after the Administrator had redefined the industry on May 22, 1939, and again adopted its recommendations which had been agreed upon.

the Administrator's order with respect to exclusion of wool from the definition of the textile industry.

We conclude also that the composition of the Committee satisfies the requirements of the Act. The Committee consisted of twenty-one persons, seven selected from each of the three groups represented. Of the employer representatives five were cotton goods manufacturers, and four of these were from the southern states. The rayon and silk manufacturers each had one representative. Since these branches of the industry are predominantly northern they were selected from the north. Three of the seven members representing the public were from southern states, one was from Pennsylvania and three from the middle west. Two of the representatives of labor were from the south, three from the north and two of them from Washington, D. C. All five of the non-southern labor members of the Committee were executive officials of or connected with labor organizations, national in scope, which represented employees in the south. Thus nine of the members of the Committee were from the south, and the Administrator could have concluded that five others fairly represented the south.

While only 31 per cent of the factories in the industry are in the south, 51.5 per cent of the value of the product is produced in southern mills and 55 per cent of the wage earners in the industry are employed by those mills. Petitioner argues that since the south had a mathematical preponderance in the Industry the Administrator was required by the statute to appoint a majority of each group, or at least a majority of the members of the Committee from that region. But the requirement of the statute that the Administrator give "due regard" to geographical considerations is not a requirement for a mathematical geographical apportionment of the committee. It calls for the exercise of discretion by the Ad-

ministrator in selecting, with the purposes of the Act in mind, a committee on which the geographically distributed interests of the Industry shall be fairly represented. As the record shows that the lowest wage scale prevailed in the southern mills, the Administrator could have concluded that a selection of a committee, a majority of whose members represented a low wage locality would tend to defeat the purposes of the Act. The Act was also intended to protect the interests of employers and employees of mills in other localities which compete with the low wage scale mills. We cannot say that the Administrator failed to give "due regard" to geographical considerations or otherwise abused his discretion in the selection of the Committee.

Petitioner makes a great variety of criticisms of the proceedings before the Committee, all of which rest on the presupposition that either the statute or the demand of due process of law requires the Committee to hold hearings upon notice to interested persons and that its hearings be subject to review before the Administrator and finally as a part of the proceedings before the Administrator to judicial review on petition to the Circuit Court of Appeals, as provided by §10.

Section 5(c) directs that the Administrator shall "by rules and regulations prescribe the procedure to be followed by the committee." Section 5(d), as already noted, provides that the Administrator shall submit data to the committee, shall cause witnesses whom he deems material to be brought before it, and that the committee "may summon other witnesses" to aid in its deliberations. Section 8(b) requires the industry committee to "investigate" conditions in the industry. It provides that the committee "may hear such witnesses and receive such evidence as may be necessary or appropriate" and requires the committee to "recommend" to the Administrator "the highest minimum wages which it determines having due re-

gard to economic and competitive conditions, will not substantially curtail employment in the industry." After the report is filed with the Administrator he, upon due notice and hearing, is required to approve or reject the recommendations.

It is clear that the sections of the statute now before us do not require the committee to conduct a quasi-judicial proceeding upon notice and hearing. Its function, as already stated, is to investigate upon the basis of data which the Administrator may submit and which the committee may procure for itself and to report its recommendation with respect to the minimum wage. . . . That such is the interpretation of the statute is abundantly supported by its legislative history. . . .

The demands of due process do not require a hearing, at the initial state or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. The proceedings before the Administrator as provided by §8(b) satisfy the requirements of due process without further requirement, which the statute omits, of a hearing on notice before the Committee. . . .

The command of §8(d) that the Administrator, as a prerequisite to a wage order, find that the recommendations of the committee "are made in accordance with law" does not extend to a review of the evidence and hearings before the committee or an investigation of the mental processes by which Committee members reached their conclusion to recommend the minimum wage, or extend beyond inquiry upon evidence before the Administrator whether the requirement of statute and rules of the Administrator as to the composition of the committee, the definition of the industry, and the actions required to be taken by the committee have been observed.

Such being the function of the commit-

tee it is immaterial that substitutes were appointed for two members in the course of its deliberations, it not appearing that they did not consider the evidence taken and the proceedings had before their appointment to the Committee.

Procedure before the Administrator.

Notice of the hearing before the Administrator was given in conformity to the statute, and since the notice was forty days in advance of the time when petitioner's representative was heard and introduced evidence into the record and a further opportunity was given to present evidence, the contention that the notice to petitioner was inadequate or failed to meet constitutional requirements is without merit. And as the issue for determination by the Administrator in the light of the statutory requirements was framed by the report and recommendation of the Committee to the Administrator there was no failure to inform petitioner of the contentions made in behalf of the Government. . . . Nor can we find any error or want of due process in permitting the Industry Committee to appear before the Administrator by counsel and to offer evidence in support of its recommendations or in permitting members of the staff of the Wage and Hour Division to give testimony. . . .

Support in the evidence of the Administrator's findings. By §10 review of the Administrator's order by the courts is limited to questions of law "and findings of fact by the Administrator when supported by substantial evidence shall be conclusive." Petitioner attacks the Administrator's findings that the 32½ cent minimum will not substantially curtail employment and that classification of the industry is not required, on the ground that they are not supported by substantial evidence.

Since the statute required these findings to be based upon consideration of economic and competitive conditions in the industry, as affected by transporta-

tion, living and production costs, including wages, the findings rest, to a substantial degree upon studies of statistical data with respect to these factors gathered by government agencies and published by them officially. They include publications of the Bureau of Labor Statistics, the Interstate Commerce Commission, the Federal Trade Commission, and the Economic Section of the Wage and Hour Division of the Department of Labor. The most important and the principal object of attack is Bulletin No. 663 of the Bureau of Labor Statistics entitled "Wages in Cotton Goods Manufacturing," which is a study of the economic conditions generally prevailing in the cotton textile industry and in particular of the wages of employees. The statistics gathered, if regarded as of probative force, and the inferences drawn from them by the Administrator, taken with other evidence, amply support his findings.

The argument of petitioner is not that the record contains no evidence supporting the findings but rather that this class of evidence must be ignored because not competent in a court of law. But it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed. . . .

The reliability of the data published in the Bulletin was supported before the Administrator by the testimony of some of his [its?] compilers. In the circumstances we think the Bulletin and other documents in question were evidence to be considered by the Administrator; that the weight to be given to them and the inferences to be drawn from them were for the Administrator and not the courts, and that they lend substantial support to his findings.

Further contentions that the findings, and particularly the finding that classification in the industry is unnecessary, and the subsidiary findings as to differences in transportation, living, and production costs, are unsupported by substantial evidence are addressed either to the weight and dependability of the evidence supporting the findings or to the testimony of particular witnesses or conflicting evidence on which petitioner relies. We have examined these contentions and, without further elaboration of the details of the evidence, we conclude that the Administrator's findings are supported by substantial evidence. Any different conclusion would require us to substitute our judgment of the weight of the evidence and the inferences to be drawn from it for that of the Administrator which the statute forbids. . . .

III. WAGE REGULATION FOR THE RAILROADS

Long before consideration was given to federal legislation on wages laws for industry generally, the question had arisen whether Congress could, at least for a short period and in an emergency, fix wages for the railroad industry. That Congress has broad powers over railroads in view of their interstate nature has been universally recognized, but the precise extent of such powers has never been defined. In *Wilson v. New*, the Supreme Court was faced with the question of

determining whether Congress' power over interstate commerce extended to wages.

Late in the summer of 1916, the railroad brotherhoods, failing to agree with the railroads on wages and hours, threatened a general strike. President Wilson suggested the adoption of the basic eight-hour day; this did not mean that the men were to be limited to eight hours, but rather that they would now receive for eight hours what they formerly received for ten hours. Congress then

passed the Adamson Act which provided for the basic eight-hour day. The Adamson Act was soon challenged by the railroads as an unconstitutional exercise of Congress' power over interstate commerce.

It is often supposed that this case is an hours case because it provided for an eight-hour day. This view is mistaken, for as Chief Justice White said in his opinion, "... we put the question as to the eight-hour standard entirely out of view on the ground that the

authority to permanently establish it is so clearly sustained as to render the subject not disputable." The only real question concerned wages: that is, could Congress compel railroads to give ten hours' pay for eight hours' work, even for a short period of time during which a study was to be conducted of the effect of the Act on the railroads (with the promise of increased freight rates if railroad costs mounted)?

WILSON *v.* NEW

Supreme Court of the United States. 1917.
243 U. S. 332; 37 Sup. Ct. 298; 61 L. Ed. 755.

MR. CHIEF JUSTICE WHITE delivered the opinion of the Court. . . .

. . . Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce.

But passing this, let us come to briefly recapitulate some of the more important of the regulations which have been enacted in the past in order to show how necessarily the exertion of the power to enact them manifests the existence of the legislative authority to ordain the regulation now before us, and how completely the whole system of regulations adopted in the past would be frustrated or rendered unavailing if the power to regulate under the conditions stated which was exerted by the act before us was not possessed. That regulation gives the authority to fix for interstate carriage a reasonable rate subject to the limitation that

rights of private property may not be destroyed by establishing them on a confiscatory basis, is settled by long practice and decisions. That the power to regulate also extends to many phases of the business of carriage and embraces the right to control the contract power of the carrier in so far as the public interest requires such limitation, has also been manifested by repeated acts of legislation as to bills of lading, tariffs and many other things too numerous to mention. . . . Equally certain is it that the power has been exercised so as to deal not only with the carrier, but with its servants and to regulate the relation of such servants not only with their employers, but between themselves. . . . Illustrations of the latter are afforded by the Hours of Service Act, the Safety Appliance Act and the Employers' Liability Act. Clear also is it that an obligation rests upon a carrier to carry on its business and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so and also that government possesses the full regulatory power to compel performance of such duty. . . .

In the presence of this vast body of acknowledged powers there would seem to be no ground for disputing the power which was exercised in the act which is

before us so as to prescribe by law for the absence of a standard of wages caused by the failure to exercise the private right as a result of the dispute between the parties, that is, to exert the legislative will for the purpose of settling the dispute and bind both parties to the duty of acceptance and compliance to the end that no individual dispute or difference might bring ruin to the vast interest concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed. This result is further demonstrated, as we have suggested, by considering how completely the purpose intended to be accomplished by the regulations which have been adopted in the past would be rendered unavailing or their enactment inexplicable if the power was not possessed to meet a situation like the one with which the statute dealt. What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as a result of a mere dispute between the parties or their failure to exert a primary private right concerning a matter of interstate commerce? Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service, if there was no power in government to prevent all service from being destroyed? Further yet what benefits would flow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employee and of the employees among themselves and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident and giving efficient remedies for

that purpose, if there was no power to remedy a situation created by a dispute between employers and employees as to rate of wages, which if not remedied, would leave the public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character? And finally, to what derision would it not reduce the proposition that government had power to enforce the duty of operation, if that power did not extend to doing that which was essential to prevent operation from being completely stopped by filling the interregnum created by an absence of a conventional standard of wages because of a dispute on that subject between the employers and employees by a legislative standard binding on employers and employees for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties?

We are of opinion that the reasons stated conclusively establish that from the point of view of inherent power the act which is before us was clearly within the legislative power of Congress to adopt. . .

Justices Dav, Pitney, Van Devanter, and McReynolds dissented, separate dissenting opinions being written by all but Justice Van Devanter. In addition, Justice McKenna wrote an opinion concurring with Chief Justice White. It is interesting to speculate what the Chief Justice would have held if Congress had flatly fixed wages without providing for the possibility of freight rate increases; even more, whether he would have decided the case in the same way if the decision had not been handed down just before the United States entered the World War.

IV. THE FORM OF WAGE PAYMENT

Minimum-wage laws have not been the only kind of wage laws passed in the United States. Rather, various types of laws have

been enacted covering such matters as the time of payment, the form of the payment, the basis of payment, deductions from wages,

etc. Such laws have been intended to protect workers against employers who seek to make unjustified deductions from wages or who delay unduly the time of payment or who try to pay their workers in scrip which may be used only at company stores. State courts have often differed among themselves as to the constitutionality of such laws. In a number of cases, courts have rejected the laws on the ground that they tended to degrade the worker by making him a victim of a paternalistic attitude.

When workers receive their pay in forms other than cash, they are apt to lose at least part of their pay. Thus, if wages are paid in scrip which can be used only at a company-owned store, workers might have to pay much more for goods they buy than they would have to pay if they were able to purchase at any store they pleased. Or, if wages are paid by check or by ticket which can be converted into cash only at a discount, workers will receive a net payment of less than they were supposed to. To prevent this situation, many states have provided for the payment of all wages in cash or for the prompt redemption of other evidences of payment.

The decisions of the United States Supreme Court have conclusively affirmed the power of a state to bar scrip payments, but these were preceded by state court decisions anxious to save for the workman his freedom to contract. Thus, in *State v. Goodwill*,¹ the Supreme Court of West Virginia ruled that the law of 1887 which prohibited mine owners and manufacturers from paying in scrip was discriminatory in that it did not apply to merchants and railroads and constituted an unconstitutional invasion of the right to contract. The law, said the court, "is a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue, and manhood of the American laborer, and foist upon the people

a paternal government of the most objectionable character, because it assumes that the employer is a knave, and the laborer an imbecile."

The Supreme Court of Pennsylvania took a similar stand. In holding unconstitutional the law of 1881 which provided for the payment of wages in cash, the court said, in the *Godcharles* case: "The Act is an infringement alike of the right of the employer and the employé; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether for money or goods . . . and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."²

On the other hand, the right of the state to protect workers against exploitation has been recognized by many state courts, as well as the Supreme Court, which have ruled that the police power extends to laws providing for cash payment of wages, weekly payment, etc.

² *Godcharles & Co. v. Wigeman*, 113 Pa. St. 431, 437, 6 Atl. 354 (1886). See also *Fraser et al. v. People*, 141 Ill. 171, 31 N. E. 395 (1892), holding that an "anti-truck" law (forbidding employers to require that workers deal in company stores) was unconstitutional because it was not a health measure nor an appropriate use of the state's police power and that it discriminated unjustifiedly against the firms covered, namely those engaged in mining and manufacturing. See also *State v. Loomis*, 115 Mo. 307, 22 S. W. 350 (1893). For a discussion of the subject generally, see Lindley D. Clark, *Labor Laws That Have Been Declared Unconstitutional*, U. S. Bureau of Labor Statistics, Bulletin No. 321 (Washington: Government Printing Office, 1922), pp. 36-53, especially the cases cited on pp. 50-51; and Lindley D. Clark and Stanley J. Tracy, *Laws Relating to Payment of Wages*, U. S. Bureau of Labor Statistics, Bulletin No. 408 (Washington: Government Printing Office, 1926).—E.S.

¹ 33 W. Va. 179, 10 S. E. 285 (1889).—E.S.

KNOXVILLE IRON COMPANY v. HARBISON

Supreme Court of the United States. 1901.

183 U. S. 13; 22 Sup. Ct. 1; 46 L. Ed. 55.

MR. JUSTICE SHIRAS
opinion of the court.

delivered the

This is a suit in equity brought to this court by a writ of error to the Supreme

Court of the State of Tennessee, involving the validity, under the Federal Constitution, of an act of the legislature of Tennessee, passed March 17, 1899, Acts of 1899, c. 11, p. 17, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employes. . . .

In *Holden v. Hardy*, 169 U. S. 366, the validity of an act of the State of Utah, regulating the employment of workingmen in underground mines and fixing the period of employment at eight hours per day, was in question. There, as here, it was contended that the legislation deprived the employers and employes of the right to make contracts in a lawful way and for lawful purposes; that it was class legislation, and not equal or uniform in its provisions; that it deprived the parties of the equal protection of the laws; abridged the privileges and immunities of the defendant as a citizen of the United States, and deprived him of his property and liberty without due process of law. But it was held . . . that the act in question was a valid exercise of the police power of the State. . . .

In *St. Louis, Iron Mountain &c. Railway v. Paul*, 173 U. S. 404, a judgment of

the Supreme Court of Arkansas, sustaining the validity of an act of the legislature of that State which provided that whenever any corporation or person engaged in operating a railroad should discharge, with or without cause, any employé or servant, the unpaid wages of any such servant then earned should become due and payable on the date of such discharge without abatement or deduction, was affirmed. It is true that stress was laid in the opinion in that case on the fact that, in the constitution of the State, the power to amend corporation charters was reserved to the State, and it is asserted that no such power exists in the present case. But it is also true that, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State and its inhabitants, the police power of the State may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters. . . .¹

¹ See also *Dayton Coal and Iron Co. v. Barton*, 183 U. S. 23, 22 Sup. Ct. 5 (1901) and *Keokee Consolidated Coke Co. v. Taylor*, 234 U. S. 224, 34 Sup. Ct. 856 (1914).

V. THE TIME OF WAGE PAYMENT

Most states have passed laws providing for the payment of wages at certain intervals, the most common being semi-monthly; in a number of instances, the laws provide for weekly payment. Sometimes the laws apply only to corporations, sometimes only to people engaged on public work (e. g., the Delaware law) or to employees of coal mining companies and railroads (e. g., the Iowa law). The law may also provide, as in Indiana, that weekly or semi-monthly payment is necessary only where the employees have requested it. Further, a law may provide that discharged

workers must receive at the time of discharge all wages due them.

As we have indicated above, state courts have occasionally held such statutes unconstitutional.¹ In view of the attitude of the U. S. Supreme Court, however, it may be regarded as settled that laws requiring the payment of wages at specified intervals are constitutional.

¹ See cases cited by Lindley D. Clark, *Labor Laws That Have Been Declared Unconstitutional*, U. S. Bureau of Labor Statistics, Bulletin No. 321 (Washington: Government Printing Office, 1922), pp. 46-50.—E.S.

ERIE RAILROAD COMPANY *v.* WILLIAMS

Supreme Court of the United States. 1914.
233 U. S. 685; 34 Sup. Ct. 761; 58 L. Ed. 1155.

In 1907, New York passed a law (Laws of 1907, c. 415) providing that railroad and certain other companies shall pay their employees semi-monthly and in cash, and prohibiting payment in scrip or company orders. The Erie Railroad challenged the law, so far as it provided for semi-monthly payment, asserting that it was being deprived of its freedom of contract and that the law constituted a burden on interstate commerce. Justice McKenna, for the Supreme Court, ruled that the burden on interstate commerce was indirect and, therefore, permissible. Further, under the reserved right of the state to amend corporate charters, New York could require semi-monthly payment, inasmuch as the state could have so provided in the original charter. The opinion then turned to the broader issue of whether the statute infringed unduly on liberty of contract.

MR. JUSTICE MCKENNA: . . . Personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion

does not suffice to bring it within the range of judicial cognizance. . . .

In considering the competency of the legislative judgment and the power the courts have to review it, we may inquire, what is here complained of? What does the Labor Law of New York do that seriously affects the liberty of plaintiff? It requires cash payments. That requirement is not now resisted. It requires semi-monthly payments. Plaintiff now pays monthly. The extent of its grievance, therefore, is two payments a month instead of one, with the consequence of expense and inconvenience. It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a State to exert its reserved power or its police power. . . .

It is, however, contended by plaintiff that the law under review cannot be sustained either as an exertion of the police power or as an alteration of the charter of plaintiff unless the court can say from a comparison of the systems of payment—monthly and semi-monthly—that the former affects adversely the general welfare or public good and the latter “remedies that evil or condition and of itself does not constitute an unjust burden upon the employer.” But whether the law imposes an unjust burden depends upon its validity, and whether the public welfare is subserved by one system or the other is, as we have said, in the first instance, for the legislature to determine, and its judgment will not be reviewed unless “unmistakably and palpably in excess of legislative power.” . . . The Labor Law of New York cannot be so characterized.

There are certainly advantages of cash payment over deferred payments, and an advantage to those who work for a living of a ready purchasing power for their needs over the use of credit. This is found as a fact by the trial court, and

even if there is no affirmative evidence of it, it is the expression of experience.

¹ See also *St. Louis, Iron Mountain & Southern Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419 (1899).

VI. THE BASIS OF WAGE PAYMENT

A special type of wage law is that which has been passed by a number of states and applies only to coal miners. This type, often known as an "anti-screen" law, provides that where payment is based on the amount of coal mined, the coal shall be weighed before passing over a screen. In passing the coal over

the screen, slate and other impurities are removed; also, small pieces of coal are removed. Hence, if the coal is weighed after screening, the miner will not be paid for the total amount of material mined.

* *

McLEAN v. ARKANSAS

Supreme Court of the United States. 1909.
211 U. S. 539; 29 Sup. Ct. 186; 53 L. Ed. 290.

The State of Arkansas passed a law in 1905 making it a misdemeanor for operators of coal mines employing ten or more miners to weigh the coal after it had passed over a screen. The operators were permitted by the statute to reject the coal when it came to the surface, but if they accepted it, it had to be weighed before screening. The state supreme court affirmed a conviction of McLean for violation of the statute, and the case came to the United States Supreme Court on appeal.

* * * *

MR. JUSTICE DAY delivered the opinion of the court. . . .

The objections to the judgment of the state Supreme Court of a constitutional nature are twofold: First, that the statute is an unwarranted invasion of the liberty of contract secured by the Fourteenth Amendment of the Constitution of the United States; second, that the law being applicable only to mines where more than ten men are employed, is discriminatory, and deprives the plaintiff in error of the equal protection of the laws within the inhibition of the same Amendment.

That the Constitution of the United States, in the Fourteenth Amendment

thereof, protects the right to make contracts for the sale of labor, and the right to carry on trade or business against hostile state legislation, has been affirmed in decisions of this court, and we have no disposition to question those cases in which the right has been upheld and maintained against such legislation. . . . But in many cases in this court the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with the laws declaring the public policy of the State, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. . . .

It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people.

It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in

an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

The legislature being familiar with the local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. . . .

If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the Government.

We take it that there is no dispute about the fundamental propositions of law which we have thus far stated; the difficulties and differences of opinion arise in their application to the facts of a given case. Is the act in question an arbitrary interference with the right of contract, and is there no reasonable ground upon which the legislature, acting within its conceded powers, could pass such a law? Looking to the law itself we find its curtailment of the right of free contract to consist in the requirement that the coal mined shall not be passed over any screen where the miner is employed at quantity rates, whereby any part of the value thereof is taken from it before the same shall have been weighed and credited to the employé sending the same to the surface, and the coal is required to be accounted for according to the legal rate of weights as fixed by the law of Arkansas,

and contracts contrary to this provision are invalid. This law does not prevent the operator from screening the coal before it is sent to market; it does not prevent a contract for mining coal by the day, week or month; it does not prevent the operator from rejecting coal improperly or negligently mined and shown to be unduly mingled with dirt or refuse. The objection upon the ground of interference with the right of contract rests upon the inhibition of contracts which prevent the miner employed at quantity rates from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine.

If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail. . . .

We are unable to say, in the light of the conditions shown . . . and in the necessity for such laws, evinced in the enactments of the legislatures of various States, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and the promotion of the harmonious relations of capital and labor engaged in a great industry in the State. . . .

. . . It is argued for the validity of this law that its tendency is to require the miner to be honestly paid for the coal actually mined and sold. It is insisted that the miner is deprived of a portion of his just due when paid upon the basis of screened coal, because while the price may be higher, and theoretically he may be compensated for all the coal mined in the price paid him for screened coal, that practically, owing to the manner of the operation of the screen itself, and its

different operation when differently adjusted, or when out of order, the miner is deprived of payment for the coal which he has actually mined. It is not denied that the coal which passes through the screen is sold in the market. It is not for us to say whether these are actual conditions. It is sufficient to say that it was a situation brought to the attention of the legislature, concerning which it was entitled to judge and act for itself in the exercise of its lawful power to pass remedial legislation.

The law is attacked upon the further ground that it denies the equal protection of the law, in that it is applicable only to mines employing ten or more men. . . .

. . . There is no attempt at unjust or unreasonable discrimination. The law is alike applicable to all mines in the State employing more than ten men under-

ground. It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state and affecting but few men, and not requiring regulation in the interest of the public health, safety or welfare. We cannot hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the Supreme Court of Arkansas, which has affirmed its validity. . . .¹

[MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.]

¹ See also *Rail Coal Co. v. Ohio Industrial Commission*, 236 U. S. 338, 35 Sup. Ct. 359 (1915).

VII. LAWS TO PREVENT DEDUCTIONS AND TO ENFORCE WAGE CLAIMS

An interesting type of wage law is that which forbids employers to make certain deductions from their employees' wages. About half of the states have such laws on their books; their purpose is to protect workers against unjustified deductions. Thus, a law may provide that fines may not be imposed except after agreement between the employer and the employee as to the amount of the fine. Or, a law may forbid a fine which exceeds in amount the damage done, or the time lost, etc.

In quite recent years, various laws have been passed which aim at prohibiting the "kick-back." The term "kick-back" is a relatively new one, but the practices it denotes are quite old. In its most generally accepted meaning, the kick-back refers to the devices by which the employer pays the worker less than the contract rate or receives back from the worker part of the wage paid. Thus, the kick-back presents the means for avoiding the requirements of union contracts (though unions sometimes wink at kick-backs during depression times) and wage statutes. In a broader sense, the kick-back may be said to

include all forms of deductions from wages, other than those which represent payments on legitimate debts due the employer. From the worker's standpoint, the kick-back is the price he pays for the opportunity to work, for he believes, probably correctly, that if he does not agree to the kick-back in one form or other, he will soon find himself unemployed.

California has made it a misdemeanor to receive from an employee any part of the wages due him or to withhold from an employee any part of the wages agreed upon by collective bargaining or to pay wages lower than those set by statute or contract.¹ A Connecticut law prohibits kick-backs, and provides that the payment of a smaller sum in wages than that agreed on in a written contract or the repayment by the employee of any wages, other than in payment of a written instrument, shall be deemed prima facie evidence of violating the law.² A Minnesota law makes it a misdemeanor to receive

¹ *California Labor Code of 1937*, Secs. 221-223.—E.S.

² *1939 Supplement to the Laws of Connecticut*, Sec. 1321 (c).—E.S.

kick-backs or to demand a receipt for more wages than those received.³

Other state laws are designed to prohibit unjustified fines, to prevent an employer from charging interest for advances on wages where payday has been unreasonably delayed, and to ban deductions from wages for contributions to which the worker has not agreed.

Congress, too, recognized the kick-back evil, and, in the Act of June 13, 1934, prohibited kick-backs on public works. This act, sometimes referred to as the kick-back statute, provides:

Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed wholly or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than \$5000, or imprisoned not more than five years, or both.⁴

In addition, Congress has also acted to bar kick-backs on public contracts, other than construction work. Section 1(b) of the Walsh-Healey Act provides that the minimum wages set by the Secretary of Labor shall be paid "without subsequent deduction or rebate on any account. . . ." This provision, however, would seem to be effective only where the

kick-back would bring the wage below the minimum set.

A similar prohibition on kick-backs, as far as interstate trade and industry in general are concerned, is implicit in the Fair Labor Standards Act. Unjustified deductions from wages which would cause the wage to fall below the minimum undoubtedly violate the law. But this would, of course, be equally true of any minimum wage law, state or federal; for without an express or implied ban on kick-backs, the wage provisions of a law, or an administrator's rulings thereunder, would be meaningless whenever an unscrupulous employer decided to exploit his workers' economic weakness.

Another protection to the worker's wage is the mechanic's lien law. Its purpose is to insure payment for wages and materials. By filing a mechanic's lien, the worker gets a claim against the property on which he has worked which precedes the claims of mortgagees and general creditors. Not all workers, however, are protected by mechanic's lien laws, for the laws of the different states vary considerably in their coverage, and these laws are more appropriate to the handicraftsman than to the factory hand.

A more recently inaugurated device to help wage-earners to collect wages due is authorization to the state department of labor to act for workers, whose claims are usually for small sums like \$25. Six states had such laws by 1933; by 1940 nine had been added, plus Hawaii, and several in which departments gave informal aid. In 1939 over \$500,000 was collected for employees.

³ *Mason's Minnesota Statutes of 1927*, Sec. 3444.—E.S.

⁴ 48 Stat. 948 (1934).—E.S.

CHAPTER EIGHT

HOURS OF WORK LAWS

Legislation regulating the hours of work (covering maximum hours of work per day or night, maximum hours per week, provision for a day of rest, and prohibitions on night work) comprises one of the oldest and most important categories in the field of labor law. A great many cases involving the validity of hours laws have been adjudicated by state and federal courts, and the decisions of these courts have marked out a field of permissible governmental action, at least as far as the early laws are concerned.

So far as may be discerned from the statutes, the chief motive for legislation on hours of work was the desire to protect the worker's health and safety from the effects of over-long exposure to the pressures of industrial employment. It followed from this that action would be taken first in the case of groups, like women and children, whose physical stamina was supposed to be inferior to that of men; also that those occupations would be regulated which were regarded as hazardous. It was not until the decision in

Bunting v. Oregon (pp. 501-504) that a law applying to workers generally was upheld.

Closely related to the health motive was the desire to protect the worker against immorality and intemperance which were alleged to be products of long working hours. It is difficult, however, to infer from the statutes the extent to which legislators were impressed by these factors or by others such as the promotion of good citizenship. Quite probably, in yielding to the pressures exerted by trade unions and pro-labor groups demanding hours laws, legislators were influenced by the feeling that the public health, safety, welfare, and morals would be furthered by such laws.

In recent years, these arguments for legislation have given way in the face of unprecedented unemployment. Since the early days of the depression, the major justification for hours laws has been that they would help to increase employment. It was on this ground that hours regulations were included in statutes like the National Industrial Recovery Act, the Walsh-Healey Act, and the Fair Labor Standard Act.

I. THE CASE FOR SHORTER HOURS

THE EFFECT OF HOURS OF WORK ON THE RATES OF SICKNESS AND ACCIDENTS ¹

Obviously, workers in the dangerous trades who are overfatigued and exhausted, are more readily attacked by occupational diseases. Fatigue intensifies all the special dangers and lessens all the chances of escaping the peculiar hazards

of the trade. It was formerly supposed therefore that only in occupations subject to such special risks was special protection needed for the workers.

More recent investigations show that not only in the dangerous trades, but in all industries, a permanent predisposition to disease and premature death exists in the common phenomenon of fatigue and exhaustion. This is a danger common to all workers, even under good working

¹ *The Case for the Shorter Work Day*. Supreme Court of the United States, October Term, 1915. *Bunting v. Oregon*. Brief for Defendant in Error. Reprinted by National Consumers' League, New York, 1916, Vol. I, pp. 63, 79, 88, 131, 360, 392.—E.S.

conditions, in practically all manufacturing industries, as distinguished from the specially hazardous occupations.

In ordinary factory work, where no special occupational diseases threaten, fatigue in itself constitutes the most imminent danger to the health of the workers because, if unrepaired, it undermines vitality and thus lays the foundation for many diseases. . . .

Overfatigue predisposes to the infectious as well as to general diseases. Scientific laboratory experiments prove that fatigue markedly diminishes the power of the blood to overcome bacteria and their toxic products. . . .

Hence overfatigue constitutes a danger to the public health, as well as to the individual, since working people who are overfatigued more readily take and spread infectious disease. . . .

Nervous exhaustion, considered until recently a disorder of brain workers and the well-to-do solely, has been found by physicians and physiologists to be alarmingly prevalent among industrial workers, subject to the strain of overlong hours. Overexertion from excessive work, combined with the strain of continuing at work after fatigue has set in, constitutes an important factor in bringing on such nervous derangements, which exhibit among working people exactly the same clinical appearance as among other classes of society. . . .

The fatigue which follows excessive working hours may become chronic and result in general deterioration of health. While it may not result in immediate disease, it undermines the vitality of the worker and leads to general weakness, anaemia or premature old age.

Continuous overexertion has proved even more disastrous to health than a

certain amount of privation; and lack of work in industrial crises has entailed less injury to health than long-continued overwork. The excessive length of working hours, therefore, constitutes in itself a menace to health.

Emphasis is laid upon the need of limiting excessive working hours by the increased danger from accidents arising from the varying effects of fatigue.

The statistics of all countries which have recorded the hours in which industrial accidents occur, show that the number of accidents tends to rise after a certain number of hours of work. According to the most recent investigation, the number of accidents is usually highest during the penultimate hour of work, when muscular control and attention are at their lowest. During the last [hour] of work the accident rate may fall, owing to decreased rate of output and anticipation of rest. . . .

After fatigue has set in, the faculty of attention is in inverse ratio to the duration and intensity of work undertaken. Attention is always accompanied by a sensation of effort, and fatigue of attention is due to the continuance of the efforts and the difficulty of sustaining them.

Physiological reaction time is the name given to the interval between the occurrence of some external phenomenon and the signal of its having been perceived by any given individual. This interval is greatly influenced by fatigue. When the brain is fatigued, attention flags and reaction time is retarded. Hence, after overexertion fatigued workmen are subject to increased danger when reaction time is slowest and attention at its minimum.

THE EFFECT OF HOURS OF WORK ON MORALITY, FAMILY LIFE, AND CITIZENSHIP¹

The dangers attendant upon excessive working hours are shown also by the moral degeneration which results from overfatigue. Laxity of moral fiber follows physical debility. After excessive labor, the overtaxed worker is left stupefied or responds most readily to coarse pleasures and excitements. . . .

When the working day is so long that no time is left for a minimum of leisure and recreation, relief from the strain of work is often sought in alcoholic stimulants. Among industrial workers the desire for drink is often due to the physical incidents of factory work, such as exposure to extreme heat, or the inhalation of dust or fluff in the many trades involving such hazards. Intemperance often results also from the worker's craving for some stimulant or support for exhausted energies.

* * * *

The loss of moral restraints and intellectual ambition on the part of workers exhausted by excessive labor is a social loss. Family life, essential for the welfare of the nation, is destroyed. After overlong hours, the workers scarcely see their young children, and have neither time nor energy after working hours to share the family interests. . . .

* * * *

The welfare and safety of democracy rest upon the character and intelligence of its citizens. For the exercise of the elective franchise is determined by the mental and moral equipment of the voters. Under the conditions of modern industry, for the development of morals and intelligence, leisure is needed. Hence leisure is a prime requisite for good citizenship.

If a democracy is to flourish, the education of the citizen must not end at the

14th birthday, when wage-earning ordinarily begins. It must be a continuous process, to enable men to understand great issues as they arise, to discuss them and reach decisions upon them.

In the interest of the state, therefore, industrial labor must be limited: first, so that leisure may be provided outside of working hours; second, so that the worker shall not be too much exhausted to make use of his leisure. . . .

The growing recognition of the need of Americanization has resulted in a country-wide movement to provide evening schools to teach English and give special instruction on American institutions. Federal, state and city authorities are urging increased appropriations for these special facilities.

Obviously this whole program of Americanization is impossible unless sufficient leisure is provided *after working hours* to enable the workers to take advantage of the opportunities offered.

The task of teaching adult foreigners a new language is rendered almost hopeless unless they can come to be taught with some freshness of mind. The project of Americanization is defeated when working hours are so long that no evening leisure is left or the immigrant workers are too much exhausted to make use of it. . . .

The State is dependent upon the quality of its citizens not only for its development in times of peace, but in the last resort, for military defense. Industrial conditions which result in physical degeneration of the population are thus a menace to the very existence of the State. In communities where excessive working hours have long prevailed, progressive decline in stature, strength, and efficiency becomes markedly evident. This is conspicuously shown by the large percentage of recruits necessarily rejected from military service for physical unfitness.

¹ *The Case for the Shorter Work Day*, Vol. I, pp. 404, 414, 452; Vol. II, 532, 551, 572.—E.S.

HOURS OF WORK AND UNEMPLOYMENT

MR. GREEN. . . . Our experience during the last 5 years clearly shows that if unemployment is to be overcome, and these millions of workers who are idle are to be reabsorbed in private industry, adjustments must be made in the number of days worked per week and the number of hours worked per day. If the code-making process through which we have been passing serves no other purpose, it has served that one great national public purpose in that it has demonstrated by construction, analogy, and application that the remedy for unemployment lies in a more equitable distribution of the amount of work available and the development of a consuming market through the increased purchasing power corresponding with our wonderful facilities of production. . . .

In supporting the 30-hour-week bill, the Federation of Labor is proposing the essential remedial measure which will meet our emergency difficulties and serve as a principle for permanent development. Our proposal seeks progress without a violent overthrow of our existing institutions. We would not destroy private property but would establish the rights of those who lost control of the product of their work when hand tools gave way to power-driven machinery. We recognize that the cycle in industry includes both production of goods and their distribution for use in maintaining higher standards of living. Failure of industry to assure purchasing power so as to sell the output of consumer goods and service industries is the major cause of our break-down.

We believe power, machinery, technology, are the means to highest productive capacity so that comforts of living and

opportunities for self-development may be available for all. We say to industry and technology "Bring on your machines, but let us use them under rules that benefit us as well as you."

Hours shortened in proportion to the rate of the use of power-hours is essential to providing employment for all so that all may have incomes. . . .

During the past 3 years, the number of our unemployed has exceeded 13,000,000 and has never been under 10,000,000. To meet this problem, there is apparently complete agreement of all groups in our national life that working hours should and can be very much shortened. These millions, ranging from 10 to 13, have not been idle for 1 day or for 1 week. They have been crying for work for 5 years. So we are not basing our conclusions upon the fleeting or passing experience of a day or a week or a month. We are basing them upon a long-time experience covering more than 5 years. . . .

We are now asking for a work week reduced sufficiently to reemploy the men and women who have now been out of work for 4 or 5 years. Had the N. R. A. accomplished its primary purpose of solving the problem of unemployment, the American Federation of Labor would not today lend its support to a 30-hour bill. It is the failure of the N. R. A. to achieve any real gain in reemployment which makes imperative the 30-hour law.

Let me discuss very briefly the unemployment situation which we face today. In the first years of the depression, I made the statement before a Senate Committee that we must either reduce hours of work very considerably or maintain a large portion of our population as permanently unemployed. Our problem is now much more serious than it was when I made that statement before your committee. In November 1934 the Federal Emergency Relief Administration reported that the

¹ Testimony of William Green, president of the American Federation of Labor, *Thirty-Hour Work Week*. Hearings on S. 87, 74th Congress, 1st Session (Washington: Government Printing Office, 1935), pp. 15-20.—E.S.

number on our Government relief rolls had jumped to 19,000,000, representing more than 15 per cent of the entire population of this country. This is an all-time high for relief. The amount reported by the Federal Emergency Relief Adminis-

tration as spent in the month of November for these millions of dependent persons was over \$172,600,000. Think of it! \$172,600,000 in 1 month for relief! How long can we continue that policy?

II. THE REGULATION OF HAZARDOUS INDUSTRIES

Among the first hours laws were those which imposed a top limit to the number of hours per working day in such hazardous industries as mining and smelting. The dangerous nature of the work is universally recognized and the courts have held the laws to be a valid exercise of the state's police power. Unfortunately, the term "hazardous" is incapable of hard and fast definition; in a sense, all occupations may be said to be hazardous. There arises, therefore, a problem of interpretation with respect to those industries whose "hazardous" character is not a matter of common belief. Thus, in *Lochner v. New York* we find a majority of the United States

Supreme Court holding that the baking trade is not sufficiently hazardous to justify an hours law. Decisions in such cases are based ultimately on the beliefs and philosophies of the judges rather than on indisputable factual evidence. Those opposed to the extension of state activity can easily fail to see a "hazard" which is quite obvious to those favoring state action. Such differences of opinion are less important than they were; in view of decisions upholding general hours laws, the question of whether a particular industry is "hazardous" is of little consequence--unless such an industry should be selected for special attention.

HOLDEN v. HARDY

Supreme Court of the United States. 1898.
169 U. S. 366; 18 Sup. Ct. 383; 42 L. Ed. 780.

MR. JUSTICE BROWN . . . delivered the opinion of the court.

This case involves the constitutionality of an act of the legislature of Utah, of March 30, 1896, c. 72, entitled "An act regulating the hours of employment in underground mines and in smelters and ore reduction works." Session Laws of Utah, 1896, p. 219. The following are the material provisions:

"Sec. 1. The period of employment of workmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 2. The period of employment of workmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 3. Any person, body corporate, agent,

manager or employer, who shall violate any of the provisions of sections one and two of this act, shall be guilty of a misdemeanor."

The Supreme Court of Utah was of opinion that if authority in the legislature were needed for the enactment of the statute in question, it was found in that part of article 16 of the constitution of the State which declared that "the legislature shall pass laws to provide for the health and safety of employes in factories, smelters and mines." . . .

An examination . . . of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were

deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. . . .

. . . While the people of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State. Thus, the United States are bound to guarantee to each State a republican form of government, and the tenth section of the first article contains certain other specified limitations on the power of the several States, the object of which was to secure to Congress paramount authority with respect to matters of universal concern. In addition, the Fourteenth Amendment contains a sweeping provision forbidding the States from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws. . . .

[The court then discussed various kinds of protective legislation, including safety and health laws, the constitutionality of which had been affirmed.]

But if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their

health and morals. It is as much for the interest of the State that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted in most if not all of the States; insane asylums, public hospitals and institutions for the care and education of the blind established, and special measures taken for the exclusion of infected cattle, rags and decayed fruit. In other States laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the States, they have been generally upheld. . . .

. . . We think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting.

We concur in the following observations of the Supreme Court of Utah in this connection in its opinion . . . :

"The conditions with respect to health of laborers in underground mines doubtless differ

from those in which they labor in smelters and other reduction works on the surface. Unquestionably the atmosphere and other conditions in mines and reduction works differ. Poisonous gases, dust and impalpable substances arise and float in the air in stamp mills, smelters and other works in which ores containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced and refined, and there can be no doubt that prolonged effort day after day, subject to such conditions and agencies, will produce morbid, noxious and often deadly effects in the human system. Some organisms and systems will resist and endure such conditions and effects longer than others. It may be said that labor in such conditions must be performed. Granting that, the period of labor each day should be of a reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve and eight than ten. The legislature has named eight. Such a period was deemed reasonable. . . . The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments. Though reasonable doubts may exist as to the power of the legislature to pass such a law, or as to whether the law is calculated or adapted to promote the health, safety or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government."

The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to

obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employés, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. . . .

We have no disposition to criticize the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them, that they have no application to cases where the legislature has adjudged that a limitation is necessary for the preservation of the health of employés, and there are reasonable grounds for believing that such a determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class. . . .

We are of opinion that the act in question was a valid exercise of the police power of the State, and the judgments of the Supreme Court of Utah are, therefore,
Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

LOCHNER *v.* NEW YORK

Supreme Court of the United States. 1905.
198 U. S. 45; 25 Sup. Ct. 539; 49 L. Ed. 937.

MR. JUSTICE PECKHAM . . . delivered the opinion of the court.

The indictment . . . charges that the plaintiff in error violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law . . . in that he wrongfully and unlawfully required and permitted an employé working for him to work more than sixty hours in one week. . . . The mandate of the statute that "no employé shall be required or permitted to work," is the substantial equivalent of an enactment that "no employé shall contract or agree to work," more than ten hours per day, and as there is no provision for special emergencies the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employé may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employé to earn it.

The statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. . . . Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in

the sovereignty of each State in the Union, somewhat vaguely termed police powers. . . . Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. . . . Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employé), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State. . . .

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such

legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor. . . .

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as

a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. . . .

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. . . .

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor,

and with the right of free contract on the part of the individual, either as employer or employé. . . . To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? . . . No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. . . .

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so

called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employés, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men. . . . We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employés named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employés, if the hours of labor are not curtailed. If this be not clearly the case the individuals whose rights are thus made the subject of legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute. . . .

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers,

as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. . . . In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. . . .

This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase. . . .

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. . . .

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute . . . has no such direct relation to and no such substantial effect upon the health of the employé, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor be-

tween the master and his employés (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the Court of Appeals of New York . . . must be reversed. . . .

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting. . . .

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety. . . .

Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. . . . If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish

be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. . . .

Let these principles be applied to the present case. . . .

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employes in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our system of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real and substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legis-

lation. . . . Nor can I say that the statute has no appropriate or direct connection with that protection to health which each State owes to her citizens . . . or that it is not promotive of the health of the employes in question . . . or that the regulation prescribed by the State is utterly unreasonable and extravagant or wholly arbitrary. . . . Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. . . . Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors. . . . It is enough for the determination of the case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. . . .

The judgment in my opinion should be affirmed.

MR. JUSTICE HOLMES dissenting.

I regret sincerely that I am unable to agree with the judgment in this case. . . .

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same . . . is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. . . . United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. . . . Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. . . . The decision sustaining an eight hour law for miners is still recent. . . . Some

of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

BALTIMORE & OHIO RAILROAD COMPANY *v.* INTERSTATE COMMERCE COMMISSION

Supreme Court of the United States. 1911.
221 U. S. 612; 31 Sup. Ct. 621; 55 L. Ed. 878.

In 1907, Congress passed a law (34 Stat. 1415) setting an outside limit of sixteen to the number of hours that railroad employees engaged in interstate commerce might work in one day, and making further restrictions in the case of operators and train dispatchers. Provision was made for supervision by the Interstate Commerce Commission and the penalties were fixed for violations of the act. The Baltimore and Ohio Railroad Company alleged that the subject matter of the act was beyond the power of Congress to regulate interstate commerce.

MR. JUSTICE HUGHES. . . . By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them. . . . The fundamental question here is whether a restriction upon the hours of labor of employes who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employes and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors,

train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. . . .

Until the United States Supreme Court, in the cases given, upheld the validity of hours regulation as a health measure (though in the *Lochner* case the majority took a very narrow view of "health"), there was much difference of opinion among the state courts. The Supreme Court of Nevada, for example, held, in *Ex parte Boyce*,¹ that an eight-hour law for workers in mines, smelters, and ore reduction works did not constitute a deprivation of liberty or property without due process under either the state or the federal constitution; and affirmed its views in *Ex parte Kair*.² Similarly, the Supreme Court of Missouri, in *State v. Cantwell*,³ ruled that an eight-hour law for underground workers was a valid exercise of the police power and that the state had a right to interfere in contracts where the parties do not stand on an equality or where the interests of the public health require that a party to the contract be protected against himself. On the other hand, the Supreme Court of Colorado, in *In re Eight-Hour Bill*,⁴ said, "It is not competent for the legislature to single out the mining, manufacturing, and smelting industries of the state and impose upon them restrictions with reference to the hours of their employees from which other employers of labor are exempt. An act such as proposed would be manifestly in violation of the constitutional inhibition against class legislation." Four years later, the same court held unconstitutional an eight-

¹ 27 Nev. 299; 75 Pac. 1 (1904).—E.S.

² 28 Nev. 127, 425; 80 Pac. 463; 82 Pac. 453 (1905).—E.S.

³ 179 Mo. 245; 78 S. W. 569 (1904).—E.S.

⁴ 21 Colo. 29; 39 Pac. 328 (1895).—E.S.

hour law for miners, and workers in smelters, and ore reduction works, on the ground that this law interfered unwarrantably with property. An injury to the individual health was

not a sufficient basis for the exercise of the state's police power.⁶

⁶ *In re Morgan*, 26 Colo. 415; 58 Pac. 1071 (1899).—E.S.

III. HOURS LAWS FOR WOMEN

The argument that long hours of work may be injurious to health applies with particular force to women. The view has long prevailed that the physical structure of woman is inferior to that of man and that a working day which might not affect a man adversely might easily endanger a woman's health. This attitude was largely responsible for the fact that hours laws for women were among the early labor laws. Courts have generally been willing to hold such laws constitutional. In an early case, *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383 (1876), the Supreme Judicial Court of Massachusetts upheld a ten-hour day—60-hour week law, saying:

"It [the law of 1874] merely provides that in an employment, which the Legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legisla-

tion may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this Commonwealth that reference to the decisions is unnecessary."

This view was shared by the highest court of most other states before which the issue was raised.¹ The first such case to be decided by the United States Supreme Court was *Muller v. Oregon*, involving the constitutionality of the Oregon ten-hour law for women. This case is especially interesting because it marked the first use of the "sociological brief." Louis D. Brandeis, counsel for the state, based his case almost wholly on the testimony of official bodies, doctors, sociologists, and economists as to the effect of a long working day.

¹ See, e. g., *Commonwealth v. Beatty*, 15 Pa. Sup. Ct. 5 (1900) and *Winham v. State*, 65 Neb. 394, 91 N. W. 421 (1902).—E.S.

MULLER v. OREGON

Supreme Court of the United States. 1908.
208 U. S. 412; 28 Sup. Ct. 324; 52 L. Ed. 551.

MR. JUSTICE BREWER delivered the opinion of the court.

On February 19, 1903, the legislature of the State of Oregon passed an act (Session Laws, 1903, p. 148), the first section of which is in these words:

"Sec. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day."

Section 3 made a violation of the provisions of the prior sections a misde-

meanor, subject to a fine of not less than \$10 nor more than \$25. . . .

[Muller, owner of a laundry, had employed a woman more than ten hours in one day and was fined \$10. The Supreme Court of Oregon having affirmed the conviction, Muller appealed to the United States Supreme Court.]

The single question is the constitutionality of the statute under which the defendant was convicted so far as it affects the work of a female in a laundry. That it does not conflict with any provisions of the state constitution is settled by the decision of the Supreme Court of the State. The contentions of

the defendant, now plaintiff in error, are thus stated in his brief:

"(1) Because the statute attempts to prevent persons, *sui juris*, from making their own contracts, and thus violates the provisions of the Fourteenth Amendment. . . .

"(2) Because the statute does not apply equally to all persons similarly situated, and is class legislation.

"(3) The statute is not a valid exercise of the police power. The kinds of work prescribed are not unlawful, nor are they declared to be immoral or dangerous to the public health; nor can such a law be sustained on the ground that it is designed to protect women on account of their sex. There is no necessary or reasonable connection between the limitation prescribed by the act and the public health, safety or welfare." . . .

. . . It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters. . . .

The legislation and opinions referred to . . . may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that

fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract. . . .

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing special care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true

that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon him and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the

passion of man. The limitations which this statute places [*sic*] upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her. . . .

For these reasons, and without questioning in any respect the decision in *Lochner v. New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry. . . .

* * * *

Other cases in which the court upheld the validity of hours laws for women include *Riley v. Mass.*, 232 U. S. 671, 34 Sup. Ct. 469 (1914) and *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342 (1915). In the latter case, the constitutionality of a California eight-hour law was affirmed.

IV. NIGHT WORK FOR WOMEN

About a dozen states have enacted laws prohibiting the employment of women at night in most industrial and commercial establishments. Such laws have been justified chiefly on health grounds; night work is commonly regarded as more fatiguing than day work. Laws which prohibit night work are thus to be regarded as a logical extension of the philosophy behind hours laws for women working during the day. No night-work laws

have been passed for men; it is scarcely likely that such laws would be passed except for unusual occupations, or, if passed, that they would be upheld by the courts. As far as laws for women are concerned, there seems to be no doubt of their constitutionality. It should be noted that these laws almost invariably include children, but there is no question as to the power of a state to legislate concerning minors.

PEOPLE *v.* WILLIAMS

Court of Appeals of New York. 1907.

189 N. Y. 131; 81 N. E. 778.

GRAY, J. . . . [This case involves the constitutionality of a statute prohibiting the employment of women between 9 P. M. and 6 A. M. in factories, as well as establishing a ten-hour day.] I find nothing in the language of the section which suggests the purpose of promoting health, except as it might be inferred that for a woman to work during the forbidden hours of night would be unhealthful. If the inhibition of the section in question had been framed to prevent the ten hours of work from being performed at night, or to prolong them beyond nine o'clock in the evening, it might, more readily, be appreciated that the health of women was the matter of legislative concern. That is not the effect, nor the sense, of the provision of the section with which, alone, we are dealing. It was not the case upon which the defendant was convicted. If this enactment is to be sustained, then an adult woman, although a citizen and entitled as such to all the rights of citizenship under our laws, may not be employed, nor contract to work, in any factory for any period of time, no matter how short, if it is within the prohibited hours; and this, too, without any regard to the healthfulness of the employment. It is clear, as it seems to me, that this legislation cannot, and should not, be upheld as a proper exercise of the police power. It is, certainly, discriminative against female citizens, in denying to them equal rights with men in the same pursuit. The courts have gone very far in upholding legislative enactments, framed clearly for the welfare, comfort and health of the community, and that a wide range in the exercise of the police power of the state should be conceded, I do not deny; but, when it is sought under the guise of

a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked to protect against legislative acts, plainly, transcending the powers conferred by the Constitution upon the legislative body.

In this section of the Labor Law, it will be observed that women are classed with minors under the age of eighteen years; for which there is no reason. The right of the state, as *parens patriae*, to restrict, or to regulate, the labor and employment of children is unquestionable; but an adult female is not to be regarded as a ward of the state, or in any other light than the man is regarded, when the question relates to the business pursuit or calling. She is no more a ward of the state than is the man. She is entitled to enjoy, unmolested, her liberty of person, and her freedom to work for whom she pleases, where she pleases, and as long as she pleases, within the general limits operative on all persons alike, and shall we say that this is valid legislation, which closes the doors of a factory to her before and after certain hours? I think not. . . .

So I think . . . that we should say, as an adult female is in no sense a ward of the state, that she is not to be made the special object for the exercise of the paternal power of the state and that the restriction here imposed upon her priv-

ilege to labor, violates the constitutional guarantees. In the gradual course of legislation upon the rights of a woman, in this state she has come to possess all of the responsibilities of the man and she is entitled to be placed upon an equality of rights with the man.

It might be observed that working in a factory in the night hours is not the only situation of menace to the working woman; but such occupation is, arbitrarily, debarred her.

For these reasons, I advise that the order appealed from should be affirmed. . . .

* * *

Eight years after the *Williams* case, the New York Court of Appeals reconsidered the question of night work laws for women, and reversed itself. In *People v. Schweinler Press*, 214 N. Y. 395, 108 N. E. 639 (1915), the court held that the health argument had not been adequately stressed in the *Williams* case and that at the earlier date sufficient information had not been available on the effects of night work. In the *Radice* case, below, the U. S. Supreme Court also affirmed the constitutionality of night work laws. The reasoning in the *Williams* case and that in the *Schweinler* and *Radice* cases presents some interesting contrasts.

RADICE v. NEW YORK

Supreme Court of the United States. 1924.
264 U. S. 292; 44 Sup. Ct. 325; 68 L. Ed. 690.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Plaintiff in error was convicted in the City Court of Buffalo upon the charge of having violated the provisions of a statute of the State of New York, prohibiting the employment of women in restaurants in cities of the first and second class, between the hours of 10 o'clock at night and 6 o'clock in the morning. Laws of New York, 1917, c. 535, p. 1564. . . .

The validity of the statute is challenged upon the ground that it contravenes the provisions of the Fourteenth Amendment, in that it violates (1) the due process clause, by depriving the employer and employee of their liberty of contract, and (2) the equal protection clause, by an unreasonable and arbitrary classification.

1. The basis of the first contention is that the statute unduly and arbitrarily interferes with the liberty of two adult persons to make a contract of employment for themselves. The answer of the State is that night work of the kind prohibited, so injuriously affects the physical

condition of women, and so threatens to impair their peculiar and natural functions, and so exposes them to the dangers and menaces incident to night life in large cities, that a statute prohibiting such work falls within the police power of the State to preserve and promote the public health and welfare.

The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. We cannot say that the conclusion is without warrant. The loss of restful night's sleep cannot be fully made up by sleep in the daytime, especially in busy cities, subject to the disturbances incident to modern life. The injurious consequences were thought by the legislature to bear more heavily against women than men, and, considering their more delicate organism, there would seem to be good reason for so thinking. The fact, assuming it to be such, properly may be made the basis of legislation applicable only to women. Testimony was given upon the trial to the effect that the night work in question was not

harmful; but we do not find it convincing. Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination. . . . The language used by this Court in *Muller v. Oregon*, 208 U. S. 412, 422, in respect of the physical limitations of women, is applicable and controlling:

"The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."

Adkins v. Children's Hospital, 261 U. S. 525, is cited and relied upon; but that case presented a question entirely different from that now being considered. The statute in the *Adkins Case* was

a wage-fixing law, pure and simple. It had nothing to do with the hours or conditions of labor. . . .

2. Nor is the statute vulnerable to the objection that it constitutes a denial of the equal protection of the laws. The points urged under this head are (a) that the act discriminates between cities of the first and second class and other cities and communities; and (b) excludes from its operation women employed in restaurants as singers and performers, attendants in ladies' cloak rooms and parlors, as well as those employed in dining rooms and kitchens of hotels and in lunch rooms or restaurants conducted by employers solely for the benefit of their employees.

The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. . . . Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms, renders the statute obnoxious to the Constitution. . . . Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be "purely arbitrary, oppressive or capricious." . . . But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution, must be "actually and palpably unreasonable and arbitrary." . . .

The judgment below is

Affirmed.

V. GENERAL HOURS LAWS

Public regulation of hours of work that covers men as well as women and applies to industry generally has been a rather recent

development. This lag has been caused partly by the fact that organized labor did not, in the past, press for hours laws for men, pre-

ferring to effect reductions in the hours of work by means of collective bargaining activities. Further, to the extent that health was the primary justification for hours laws, it was more difficult to justify a law which did not apply to hazardous industries or to groups, such as women, whose health was

likely to be impaired by prolonged work. Third, legislatures and, to a greater extent, the courts have been reluctant to interfere with the bargaining activities of employers and their employees; considerable pressure from labor and pro-labor groups has been necessary to break down this reluctance.

BUNTING *v.* OREGON

Supreme Court of the United States. 1917.
243 U. S. 426; 37 Sup. Ct. 435; 61 L. Ed. 830.

The first general hours law to come before the U. S. Supreme Court was the Oregon ten-hour law. This statute limited the hours of work in mills and factories to ten hours a day and provided that three hours' overtime might be worked if the overtime was paid for at the rate of one and one-half times the regular hourly rate.

* * * *

MR. JUSTICE MCKENNA delivered the opinion of the court.

Indictment charging a violation of a statute of the State of Oregon, §2 of which provides as follows:

"No person shall be employed in any mill, factory or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; *provided, however,* employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half of the regular wage."

A violation of the act is made a misdemeanor, and in pursuance of this provision the indictment was found. It charges a violation of the act by the plaintiff in error, Bunting, by employing and causing to work in a flour mill belonging to the Lakeview Flouring Mills, a corporation, one Hammersly for thirteen hours in one day, Hammersly not being within the excepted conditions, and not being paid the rate prescribed for overtime.

A demurrer was filed to the indict-

ment, alleging against its sufficiency that the law upon which it was based is invalid because it violates the 14th Amendment of the Constitution of the United States and the Constitution of Oregon.

The demurrer was overruled; and the defendant, after arraignment, plea of not guilty, and trial, was found guilty. A motion in arrest of judgment was denied and he was fined \$50. The judgment was affirmed by the supreme court of the state. The chief justice of the court then allowed this writ of error.

The consonance of the Oregon law with the 14th Amendment is the question in the case, and this depends upon whether it is a proper exercise of the police power of the state, as the supreme court of the state decided that it is.

That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. It is contended that it is a wage law, not a health regulation, and takes the property of plaintiff in error without due process. The contention presents two questions: (1) Is the law a wage law, or an hours-of-service law? And (2) if the latter, has it equality of operation?

Section 1 of the law expresses the policy that impelled its enactment to be the interest of the State in the physical well-being of its citizens and that it is injurious to their health for them to work "in any mill, factory or manufacturing establishment" more than ten hours in

any one day; and §2, as we have seen, forbids their employment in those places for a longer time. If, therefore, we take the law at its word, there can be no doubt of its purpose, and the Supreme Court of the State has added the confirmation of its decision, by declaring that "the aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties."

It is, however, urged that we are not bound by the declaration of the law or the decision of the court. In other words, and to use counsel's language, "the legislative declaration of necessity, even if the act followed such declaration, is not binding upon this court. . . ." Of course, mere declaration cannot give character to a law nor turn illegal into legal operation, and when such attempt is palpable, this court necessarily has the power of review.

But does either the declaration or the decision reach such extreme? Plaintiff in error, in contending for this and to establish it, makes paramount the provision for overtime; in other words, makes a limitation of the act the extent of the act,—indeed, asserts that it gives, besides, character to the act, illegal character.

To assent to this is to ascribe to the legislation such improvidence of expression as to intend one thing and effect another; or artfulness of expression to disguise illegal purpose. We are reluctant to do either, and we think all the provisions of the law can be accommodated without doing either.

First, as to plaintiff in error's attack upon the law. He says: "The law is not a ten-hour law; it is a thirteen-hour law designed solely for the purpose of compelling the employer of labor in mills, factories, and manufacturing establishments to pay more for labor than the

actual market value thereof." And further: "It is a ten-hour law for the purpose of taking the employer's property from him and giving it to the employé; it is a thirteen-hour law for the purpose of protecting the health of the employé." To this plaintiff in error adds that he was convicted, not for working an employé during a busy season for more than ten hours, but for not paying him more than the market value of his services.

The elements in this contention it is difficult to resolve or estimate. The charge of pretense against the legislation we, as we have already said, cannot assent to. The assumption that plaintiff in error was convicted for not paying more in a busy season than the market value of the services rendered him, or that, under the law, he will have to do so, he gives us no evidence to support. If there was or should be an increase of demand for his products, there might have been or may be an increase of profits. However, these are circumstances that cannot be measured, and we prefer to consider with more exactness the overtime provision.

There is a certain verbal plausibility in the contention that it was intended to permit thirteen hours' work if there be fifteen and one-half hours' pay, but the plausibility disappears upon reflection. The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden, and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission. Besides, it is to be borne in mind that the legislature was dealing with a matter in which many elements were to be considered. It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the

legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided,—occasions not of such imperative necessity, and yet which should have some accommodation—abuses prevented by the requirement of higher wages. Or even a broader contention might be made that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purpose through the interest of those affected rather than by the positive fiat of the law.

We cannot know all of the conditions that impelled the law or its particular form. The Supreme Court, nearer to them, describes the law as follows:

"It is clear that the intent of the law is to make ten hours a regular day's labor in the occupations to which reference is made. Apparently the provisions permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause."

But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. . . . It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional validity of legislation cannot be determined by the

degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions, and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal.

But passing general considerations and coming back to our immediate concern, which is the validity of the particular exertion of power in the Oregon law, our judgment of it is that it does not transcend constitutional limits

This case is submitted by plaintiff in error upon the contention that the law is a wage law, not an hours-of-service law, and he rests his case on that contention. To that contention we address our decision and do not discuss or consider the broader contentions of counsel for the State that would justify the law even as a regulation of wages.

There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for the preservation of the health of employes in mills, factories, and manufacturing establishments." The record contains no facts to support the contention, and against it is the judgment of the legislature and the Supreme Court, which said:

"In view of the well-known fact that the custom in our industries does not sanction a longer service than ten hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary, as to hours of labor. Statistics show that the average daily working time among workmen in different countries is, in Australia, 8 hours; in Britain, 9; in the United States, $9\frac{3}{4}$; in Denmark, $9\frac{3}{4}$; in Norway, 10; Sweden, France, and Switzerland, $10\frac{1}{2}$; Germany, $10\frac{3}{4}$; Belgium, Italy, and Austria, 11; and in Russia, 12 hours."

The next contention of plaintiff in error is that the law discriminates against mills, factories, and manufacturing establishments in that it requires that a manufacturer, without reason other than the fiat of the legislature, shall pay for a commodity, meaning labor, one and one-half times the market value thereof while other people, purchasing labor in like manner in the open market, are not subjected to the same burden. But the basis of the contention is that which we have already disposed of; that is, that the law regulates wages, not hours of service. Regarding it as the latter, there is a basis for the classification.

Further discussion we deem unnecessary.

Judgment affirmed.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE McREYNOLDS, dissent.

MR. JUSTICE BRANDEIS took no part in the consideration and decision of the case.

* *

The *Bunting* decision seemed to remove any doubts as to the right of a state to limit the hours of work in non-hazardous occupations for men as for women. Certainly, it indicated that the U. S. Supreme Court would place no constitutional obstacles in the way of such a law. However, at least one state supreme court takes an opposite point of view; in 1939, the Supreme Court of South Carolina declared that an hours law which fixed a maximum of 56 hours of work per week and 12 hours per day was unconstitutional. The Court upheld the decision of the lower court which had ruled that the law violated, among other provisions, the due process and equal protection clauses of the Constitution. *Gasque, Inc. v. Nates*, 191 S. C. 271, 2 S. E. (2d) 36 (1939).

VI. A DAY OF REST

Laws prohibiting certain work, such as barbering, on Sundays and laws which provide that each worker shall have at least twenty-four hours of continuous rest each week have been generally upheld as valid exercises of police power. Sunday laws have sometimes been set aside where the courts have felt that the purpose of the law was not to provide for a day of rest but to compel religious observance.¹ The common view of Sun-

day laws is, however, that they are not designed to interfere with people's religious beliefs but that they are to be viewed as health measures.

¹In *Ex parte Newman*, 9 Cal. 502 (1858), the Supreme Court of California set aside the Sunday law as unconstitutional on the ground that its purpose was the benefit of religion; the statute was entitled, "An act for the better observance of the Sabbath."

Many Sunday laws have applied only to barbering, and, in a number of cases, courts have held them unconstitutional, because they did not cover other

occupations; see, e. g., *Eden v. People*, 161 Ill. 296, 43 N. E. 1108 (1896), *Ex parte Jentsch*, 112 Cal. 468, 44 Pac. 803 (1896), *State v. Granneman*, 132 Mo. 326, 33 S. W. 784 (1896). But see *People v. Bellet*, 99 Mich. 151, 57 N. W. 1094, in which the state supreme court upheld a Sunday law for barbers as a valid health measure; it should be noted, however, that the Michigan statute exempted barbers who observed Saturday as a day of rest. The New York Court of Appeals in *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541 (1896) similarly ruled that a Sunday law for barbers was constitutional on the ground that the "peculiar character of the first day of the week, not simply on account of . . . religion, but as a day of rest and recreation, has been recognized for time out of mind. . . ."—E.S.

PEOPLE v. KLINCK PACKING COMPANY

Court of Appeals of New York. 1915.

214 N. Y. 121; 108 N. E. 278.

Hiscock, J. This appeal presents as its underlying question the important one whether the legislature may require that

in certain occupations employees shall have twenty-four consecutive hours of rest in every seven days. The statute

which requires this has popularly come to be known as the "One day of rest in seven" law, and with certain exceptions and subject to certain qualifications it provides with appropriate penalties that every employer "carrying on any factory or mercantile establishment . . . shall allow every person . . . employed in such factory or mercantile establishment at least twenty-four consecutive hours of rest in every seven consecutive days."

It is undisputed that this defendant was conducting a factory within the meaning of this law and that it caused or permitted some of its employees to labor without the prescribed rest in violation of the terms of the statute. Its defense is based solely and squarely on the contention that the law is unconstitutional and invalid. Its broad claim is that in attempting to limit the right of a male adult to contract for his labor in the pursuits named, the legislature violated the provisions of the Constitution both of the State and the United States which in substantially similar language provide that no person shall be deprived "of life, liberty or property without due process of law," and also the provisions of said Constitutions which respectively provide that "No member of this State shall be . . . deprived of any of rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers," and "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

We agree with the appellant that the statute cannot be sustained as one enforcing the religious observance of any day, but that it must be sustained, if at all, as a valid exercise of the police power of the state for the promotion and protection of the public health and welfare.

It is of course very familiar law that the legislature under its so-called police power may by enactments which really tend to accomplish such beneficial public purposes interfere in many and sub-

stantial ways with individual rights without being considered as in conflict with the constitutional safeguards which surround such individual. The doctrine that personal liberty must yield to what is supposed to be the public welfare has not waned any during recent years, and if the statute now before us comes within the principles which sanction and regulate such legislation it is not subject to the attack made upon its constitutionality. For the purpose of determining whether it is thus immune we shall first briefly consider its important features and purposes and the effects which it can be seen will naturally flow from its operation. . . .

We see at the outset that it is applicable only to certain classes of employees. But these are the ones who work in factories and mercantile establishments. We know as a matter of common observation that such labor is generally indoors and imposes that greater burden on health which comes from confinement many times accompanied by crowded conditions and impure air. Thus special conditions are presented which become a reasonable basis for special consideration.

Can we say that the provision for a full day of rest in seven for such employees is so extravagant and unreasonable, so disconnected with the probable promotion of health and welfare that its enactment is beyond the jurisdiction of the legislature? Or does the very reverse seem to be its character? We have no power of decision of the question whether it is the wisest and best way to offset these conditions and give to employees the protection which they need even if we had any doubt on that subject. That question, as we have many times said in other similar cases, is for the legislature. Our only inquiry must be whether the provision on its face seems reasonable, fair and appropriate, and whether it can fairly be believed that its natural consequences will be in

the direction of betterment of public health and welfare, and, therefore, that it is one which the state for its protection and advantage may enact and enforce. It seems to me very clear that we may answer that it is such an one.

The thought of one day of rest in seven has come down to us fortified by centuries of recognition. It is true that often it has been coupled with and perhaps subordinate to the desire for religious observance. But the idea of rest and relaxation from the pursuits of other days has also been present and whether we like it or not we are compelled to see that in more recent times the feature of rest and recreation has been developing at the expense of the one of religious observance.

I suppose that no one would contend that continued and uninterrupted indoor labor would be good even for an adult man. The laws which have been passed and sustained with general approval in almost every jurisdiction limiting the hours of labor for women and children and for those engaged in especially trying employments, such as mining and the op-

eration of railroads, amply testify to the widespread belief that in certain fields the public health and welfare are subserved by generous opportunities for relaxation and recuperation. A constantly increasing study of industrial conditions I believe leads to the conviction that the health, happiness, intelligence and efficiency even of an adult man laboring in such employments as those mentioned in this statute will be increased by a reasonable opportunity for rest, for outdoor life and recreation, for attention to his own affairs, and, if he will, study and education.

Then we come to the question what is a reasonable opportunity, and within wide limits that problem is for the legislature. Anybody would probably say that one day in thirty or sixty would be too little and one day in each two days extravagant. Between these extremes none can safely assert that the mean adopted by the legislature of one day in seven is unreasonable. In fact, historical and worldwide customs seem to make it a natural one and we should not interfere with it. . . .

VII. HOURS LAWS FOR PUBLIC WORKS

That a government, state or national, may define and reduce the hours of work of its employees is not open to question, and, so far as is known, has never been questioned, since the government would have the same rights in this matter as any private employer would. However, laws which limit the hours of work of people employed by private contractors on government work have occasionally been challenged. In the cases which have come before the U. S. Supreme Court, both state and federal laws limiting the hours of work for employees on public works have

been upheld. It should be noted that in these cases there was no need for government to show that the health or welfare of the public required limitation of the hours. In the case of the federal law, the only issue was whether the government's rights as an employer extended to work which was done for it indirectly. In the case of state laws controlling work done on behalf of municipalities, the issue was whether the power of a state over its municipalities extended to regulation of hours, or whether the municipality was in the same position as a private corporation.

ATKIN *v.* KANSAS

Supreme Court of the United States. 1903.
191 U. S. 207; 24 Sup. Ct. 124; 48 L. Ed. 148.

MR. JUSTICE HARLAN . . . [Kansas c. 114) fixing eight hours as a day's work passed a law in 1891 (Statutes of 1891, for workmen employed by or on behalf

of the state or local governments except in cases of emergency and providing for payment at the current rate of wages. Penalties were fixed for violations of the law. The statute was challenged as unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment.]

. . . The work to which the complaint refers is that performed on behalf of a municipal corporation not private work for private parties. Whether a similar statute, applied to laborers or employés in purely private work would be constitutional, is a question of very large import, which we have no occasion now to determine or even to consider.

Assuming that the statute has application only to labor or work performed by or on behalf of the State, or by or on behalf of a municipal corporation, the defendant contends that it is in conflict with the Fourteenth Amendment. He insists that the Amendment guarantees to him the right to pursue any lawful calling, and to enter all contracts that are proper, necessary or essential to the prosecution of such calling; and that the statute of Kansas unreasonably interferes with the exercise of that right, thereby denying to him the equal protection of the laws.

. . . The entire argument of the defendant's counsel—seem to attach too little consequence to the relation existing between the State and its municipal corporations. Such corporations are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the

will of the Legislature; the authority of the Legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed. . . .

The improvement of the Boulevard in question was a work of which the State, if it had deemed it proper to do so, could have taken immediate charge by its own agent; for, it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character.

If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the State, does not infringe the personal liberty of any one. It may be that the State, in enacting the statute, intended to give its sanction to the view, held by many, that, all things considered, the general welfare of employés, mechanics and workmen, upon whom rest a portion of the burdens of government will be subserved if labor performed for eight continuous hours is taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reasoning; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one

undertaking work *for it or for one of its municipal agencies* should permit or require an employé on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such consideration the courts have no concern. . . .

. . . No employé is entitled of absolute right and as part of his liberty, to perform labor for the State; and no contractor for public works can excuse a violation of his agreement with the State by doing that

which the statute under which he proceeds distinctly and lawfully forbids him to do. . . .

Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant or to his employé the equal protection of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the State or of its municipal subdivisions, and alike to all employed to perform labor on such work. . . .

. . . We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done. . . .

[THE CHIEF JUSTICE and JUSTICES BREWER and PECKHAM dissented.]

ELLIS v. UNITED STATES

Supreme Court of the United States. 1907.
206 U. S. 246; 27 Sup. Ct. 600; 51 L. Ed. 1047.

MR. JUSTICE HOLMES delivered the opinion of the Court.

These are an indictment and informations under the Act of August 1, 1892, c. 352, 27 Stat. 340, "Relating to the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the United States and of the District of Columbia." . . .

The act limits the service and employment of all laborers and mechanics employed by the United States, by the District of Columbia, or by any contractor upon any of the public works of the United States or the District, to eight hours in any one calendar day, and makes

it unlawful "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." . . .

The contention that the act is unconstitutional is not frivolous, since it may be argued that there are relevant distinctions between the power of the United States and that of a State. But the arguments naturally urged against such a statute apply equally for the most part to the two jurisdictions, and are answered, so far as a State is concerned, by *Atkin v. Kansas*. . . . We see no reason to deny to the United States the power thus established for the States. Like the States, it may

sanction the requirements made of contractors employed upon its public works by penalties in case those requirements are not fulfilled. . . . Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the States, and it may be

true that the object of this law is of a kind not subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by a speculation as to motives. If the motive be conceded, however, the fact that Congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes. . . .

VIII. HOURS OF WORK AND ECONOMIC RECOVERY

At the beginning of the chapter, we pointed out that public regulation of the hours of work has been stressed, especially in recent years, as a means of bringing about economic recovery. Just as the adoption of minimum wages was supposed to increase purchasing power, so reduction in hours was supposed to result in an increase in employment. With this in view, there have been various efforts to adopt a thirty-hour law; Senator, now Mr. Justice, Black was especially active in pressing for federal legislation for the thirty-hour week and six-hour day.

The movement for a thirty-hour week law late in 1932 and early in 1933 met with no legislative success. In June, 1933, however, the National Industrial Recovery Act was passed. The N. R. A. codes of fair competition set up under this law all contained provisions for a maximum working week. The maximum was usually forty hours, though in a number of cases, e. g., men's clothing

and bituminous coal, the maximum was below forty.

Both the N. I. R. A. and the "little N. R. A." in the bituminous coal industry were invalidated as we have seen in the *Schechter* and the *Carter* cases respectively, thus bringing to a temporary end the effort at federal control of hours in private employment.

As far as work on federal contracts for materials, supplies, and equipment is concerned, the Walsh-Healey bill sets a maximum limit of forty hours a week and eight hours a day.¹

As in the case of minimum wages, the most significant recent effort of the federal government at control is that made in the Fair Labor Standards Act. The provisions of the Act in respect to hours of work are contained in Section 7.

¹ 49 Stat. 2036, sec. 1(c).—E.S.

FAIR LABOR STANDARDS ACT—MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in ex-

cess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

The Act thus provides for a maximum working week of forty hours after October, 1940. This does not mean that employees in covered occupations may not work longer hours; but if they do so they must be paid at the rate of one and one half times their regular hourly rates, for the overtime worked. In Section 7, too, there is a provision which makes special allowance for seasonal industries, allowing more than forty hours for not more than 14 weeks a year. Interesting, too, is the provision that union agreements and plans for guaranteed annual employment may allow more than the maximum number of hours in any one week (without payment at the punitive overtime rate) provided the total of hours over a period of six months or a year does not exceed 1,000 or 2,000, i. e., an average of a little less than forty hours a week.

CHAPTER NINE

THE REGULATION OF WORKING CONDITIONS

A considerable portion of American labor legislation is concerned with the regulation of conditions under which men work. These laws include provisions for protection against fire and other hazards, the proper ventilation of work rooms, precautions against occupational diseases, etc. Legislation of this sort becomes a part of the labor contract in that certain duties may be affirmatively imposed upon the employer (e. g., the guarding of hazardous machinery) or in that the employer may be prohibited from doing certain things (e. g., employing women on certain types of work).

When the government undertakes to regulate working conditions it is acting on much the same motives as those responsible for

the passage of the early wages and hours laws and of certain of the exclusion laws, such as the prohibitions on child labor. Laws on working conditions, however, have generally met with a more favorable reception at the hands of the courts than have some of the other laws. Courts have readily seen the relation between the safety of the worker and the absence of fire escapes; they have been more willing to acknowledge that the state's police power extended to the power to compel employers to provide sanitary facilities for their employees and mine operators to install additional exits from the mine than they have been to recognize the state's power to pass minimum wage laws.

I. SAFETY AND HEALTH LAWS

That the power of government to protect the public health, safety, morals, etc., extends to the complete prohibition of certain occupations and industries is beyond dispute. The manufacture and sale of intoxicating beverages, to take but one example, was prohibited by some states even before the adoption of national prohibition. Included within the broader power to prohibit is the power to regulate, and states may regulate any industry, at least where the courts are willing to recognize the existence of a relationship between the subject of regulation and the public interest. It is but a short step from the approval of regulation to protect the public generally to the approval of regulation which is intended to protect only the workers. Indeed, the dividing line between the two is

often shadowy, as in the case of the requirement for the use of safety appliances on railroads which protect both workers and that portion of the public which uses the railroads. But even where the protection clearly applies only to the workers, the courts have willingly extended the police power to cover the laws, where there is evidence that the health and safety of the workers will actually be protected.

The range of legislation dealing with health and safety is extremely broad. The following cases are intended to give a picture of typical statutes, rather than to be exhaustive. Much of the legislation which is covered deals with workers in hazardous industries, e. g., miners and those working in the dusty trades.

BOWERSOCK *v.* SMITH

Supreme Court of the United States. 1917.
243 U. S. 29; 37 Sup. Ct. 371; 61 L. Ed. 572.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Chapter 356 of the Laws of Kansas of 1903 (Gen. Stat. 1909, §§4676 to 4683) is entitled and provides in part as follows: . . .

"Sec. 4. All . . . machinery of every description used in a manufacturing establishment shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death or injury to the persons employed or laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified.

"Sec. 5. If any person employed or laboring in any manufacturing establishment shall be killed or injured in any case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury, the personal representatives of the person so killed, or the person himself, in case of injury only, may maintain an action against the person owning or operating such manufacturing establishment for the recovery of all proper damages. . . .

"Sec. 6. In all actions brought under and by virtue of the provisions of this act, it shall be sufficient for the plaintiff to prove in the first instance, in order to establish the liability of the defendant, that the death or injury complained of resulted in consequence of the failure of the person owning or operating the manufacturing establishment where such death or injury occurred to provide said establishment with safeguards as required by this act, or that the failure to provide such safeguards directly contributed to such death or injury. . . ."

This act being in force, Smith, the

superintendent of the Lawrence Paper Manufacturing Company, while engaged in adjusting some unguarded dryer rolls, was caught between them, crushed and killed. Relying upon the law above quoted, his personal representative sued Bowersock, the owner of the factory, to recover the damages suffered. The petition alleged the dangerous character of the dryer rolls and the fact that, although it was practicable to guard them, the requirements of the act in that respect had not been complied with, and charged that the failure to do so directly caused the death of Smith. It was further alleged that at the time of the accident Smith was engaged in adjusting the machinery under the direction of a superior officer, the assistant manager of the factory. The answer, while denying generally the allegations of the petition, alleged that it was not practicable to guard the dryer rolls and averred that Smith was guilty of contributory negligence. It was also averred that as superintendent Smith by his contract of employment was under the duty of safeguarding the machinery and was charged generally with authority to direct the use of the same and hence he had assumed the risk of injury from failure to guard the dryer rolls and hence his injury and death resulted solely from his own neglect and through no fault on the part of the owner.

At the trial the plaintiff's evidence tended to support all of the allegations of the petition. The defendant offered evidence tending to show that the guarding of the dryer rolls was not practicable and that Smith had been guilty of contributory negligence. Further evidence was introduced tending to show that when Smith was employed as superintendent it was stipulated by him as a condition

to his accepting the position, that he should have full and complete charge and management of the factory, including grounds, building, machinery and men, and that he should place guards on the machinery where needed for the protection of the employees. . . .

The court instructed the jury over the objection of the defendant that under the statute contributory negligence was no defense and that the fact that Smith was employed as superintendent of the factory with authority to safeguard the machinery would not bar a recovery and charged with reference to the burden of proof in accordance with the provision of the statute relating to that subject. There was a verdict for the plaintiff and the judgment entered thereon was affirmed by the court below. It was held, following previous decisions, that the common-law defenses of contributory negligence, fellow servant and assumption of the risk were not applicable to suits under the statute. The court further construing the statute, held that it embraced all employees of every class or rank in the factories to which it applied and that merely because the deceased was employed as superintendent did not exclude him from the benefits of the act nor relieve the owner from responsibility under it. And it was held that a different result was not required because the deceased had contracted with the owner to safeguard the machinery under the circumstances of his employment. In so ruling the court referred to the evidence and pointed out that although there was testimony as to the authority of the deceased under his contract to safeguard the machinery, at the same time the evidence showed that in the exercise of such authority he was under the control of three superiors, all of whom had testified that they did not consider it practicable to safeguard the dryer rolls. Attention was also directed to the notice . . . which the defendant posted with reference to guards on ma-

chinery, as showing a control over that subject by the owner. 95 Kan. 96, 147 Pac. 1118.

The case is here because of the asserted denial of rights guaranteed by the Fourteenth Amendment.

That government may, in the exercise of its police power, provide for the protection of employees engaged in hazardous occupations by requiring that dangerous machinery be safeguarded and by making the failure to do so an act of negligence upon which a cause of action may be based in case of injury resulting therefrom, is undoubted. And it is also not disputable that, consistently with due process, it may be provided that in actions brought under such statute the doctrines of contributory negligence, assumption of risk, and fellow servant shall not bar a recovery, and that the burden of proof shall be upon the defendant to show a compliance with the act. . . .

While not directly disputing these propositions and conceding that the Kansas statute contains them and that it is not invalid for that reason nevertheless it is insisted that the construction placed upon the statute by the court below causes it to be repugnant to the due process clause of the Fourteenth Amendment. This contention is based alone upon the ruling made by the court below that under the statute the deceased had a right to recover although he had contracted with the owner to provide the safeguards the failure to furnish which caused his death, a result which, it is urged, makes the owner liable and allows a recovery by the employee because of his neglect of duty. We think the contention is without merit. It is clear that the statute as interpreted by the court below—a construction which is not challenged—imposed a duty as to safeguards upon the owner which was absolute, and as to which he could not relieve himself by contract. This being true, the contention has nothing to rest upon since in the nature of things the want of power to

avoid the duty and liability which the statute imposed embraced all forms of contract, whether of employment or otherwise, by which the positive commands of the statute would be frustrated or rendered inefficacious. . . .

Again it is contended that the statute denies to the plaintiff in error the equal protection of the laws, since it discriminates against factories owned and operated by individuals in favor of those carried on by corporations. This is the case, it is said, because a corporation in the nature of things can only comply with the requirements of the statute by contracting with agents or employees to safeguard the machinery, to whom in case of injury the

corporation would not be liable, while an individual owner under the ruling of the court must perform that duty himself. The reasoning is obscure but we think it suffices to say that it rests upon an entire misconception since the statute imposes the positive duty to have the machinery duly safeguarded whether the owner be an individual or a corporation, and the want of power by contract to escape the liability which the statute imposes also equally applied to corporations as well as individuals. It follows, therefore, that the statute affords no semblance of ground upon which to rest the argument of inequality which is urged. *Affirmed.*

BARRETT *v.* INDIANA

Supreme Court of the United States. 1913.
229 U. S. 26; 33 Sup. Ct. 692; 57 L. Ed. 1050.

MR. JUSTICE DAY delivered the opinion of the Court.

The plaintiff in error was convicted . . . of the violation of a statute . . . requiring entries in certain coal mines to be of not less than a prescribed width. . . . That the mining of coal is a dangerous business and therefore subject to regulation is also well settled. It is an occupation carried on at varying depths beneath the surface of the earth, amidst surroundings entailing danger to life and limb, and has been, as it may be, the subject of regulation in the coal-mining states by statutes which seek to secure the safety of those thus employed. The legislature is itself the judge of the means necessary and proper to that end, and only such regulations as are palpably arbitrary can be set aside because of the requirements of due process under the Federal Constitution. When such regulations have a reasonable relation to the subject-matter, and are not arbitrary and oppressive, it is not for the courts to say that they are beyond the exercise of the legitimate power of legislation. . . .

We are unable to say that the requirement that entries shall have a certain width beyond the tracks, as prescribed by this statute, would not promote the safety of the employees engaged in that work. The legislature found, for reasons sufficient to itself, that such additional width, kept clear of obstructions, would promote the safety of the employees, and we are not prepared to say that in enacting such legislation it violated the Federal Constitution. . . .¹

¹ "That the business of mining coal is attended with dangers that render it the proper subject of regulation by the states in the exercise of the police power is entirely settled. . . .

"Legislation requiring the owners of adjoining coal properties to cause boundary pillars of coal to be left of sufficient width to safeguard the employees of either mine in case the other should be abandoned and allowed to fill with water cannot be deemed an unreasonable exercise of the power. In effect it requires a comparatively small portion of the valuable contents of the vein to be left in place, so long as may be required for the safety of the men employed in mining upon either property." *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 Sup. Ct. 359 (1914).

COMMONWEALTH *ex rel.* WILLIAMS *v.* BONNELL

Court of Common Pleas of Luzerne County. Pennsylvania. 1871.
8 Phila. (Pa.) 534.

HARDING, P. J. . . . [By an act approved March 3, 1871, Pennsylvania prohibited the working of mines unless they were equipped with at least two means of ingress and egress and unless certain precautions were taken to safeguard the cages in which miners were raised and lowered.]

With regard to the constitutionality of the law, we shall enter into no extended review. . . .

If the Commonwealth of Pennsylvania, through her legislature, can police our towns and cities, why may she not police the coal mines within her borders? If through her legislature she can attach conditions, rules, and regulations, which are to be observed by her citizens in the use of their own peculiar property, what is there about coal mines, or the owners thereof, that should specially exempt them from her supervision and control? If she recognizes, almost as a part of her organic law, applicable to the *property* of her citizens, the rule, long ago grown into a

maxim, *sic utere tuo ut alienum non laedas*, [so use your own as not to injure that of another], why may she not make it equally applicable to the *lives* of her citizens? The Act, as we view it, is nothing more nor less than a mandate to the operators of coal mines, that they shall so work them as not to injure the health, nor endanger the lives of persons employed in and about them. Of its constitutionality we have not the slightest doubt. It stands upon the statute book, known of all men, as the offspring of "Avondale." Of its propriety and its necessity the law-making power was taught not a moment too early. And we may say, now, that had its provisions been faithfully observed by the operators, or stringently enforced by the officer whom it called into existence, there would have been, in all human probability, twenty more living, industrious, producing human beings, and fifty less widows and orphans in "West Pittston" than there are to-day. . . .

MILES *v.* CENTRAL COAL & COKE COMPANY

Kansas City Court of Appeals of Missouri. 1913.
172 Mo. App. 229; 157 S. W. 867.

JOHNSON, J. . . .

(2) The petition pleaded a negligent breach of the provision of the mining laws of Kansas which required that in shaft mines such as that operated by defendant "there shall be maintained the ordinary means of signaling to and from the top and bottom of such shaft or slope." The meaning of this requirement is plain. It imposes the duty on the owners and operators of mines to install and use means of signaling that will equal in efficiency and safety the means that have the approval of

general usage. We think the Legislature of that state did not intend to lay down the rule that a mineowner could not install and employ means of signaling that would be better and safer than those in general use. Such rule would be too restrictive of progress and would tend to destroy, or at least greatly to impede, invention, and should not be read into the statute by construction. But the provision quoted does clearly define the limits of reasonable care, and says, in effect, that the use of means of signaling which are

less safe than those approved by general usage is negligence *per se*.

(3) The authority of the legislative department of government to deal with the subject in such manner and to curtail the scope of the freedom the common law gives to a master in the discharge of his duty to exercise reasonable care to pro-

vide his servant with reasonably safe instrumentalities with which to work cannot be questioned, and we must give effect to the statute, and say that plaintiffs were entitled to go to the jury on the hypothesis that defendant provided means of signaling that were less safe than those in ordinary use in the state. . . .

DALRYMPLE *v.* SEVCIK

Supreme Court of Colorado. 1926.
80 Col. 297; 251 Pac. 134.

SHEAFOR, J. . . . [This case concerns the constitutionality of a statute requiring the installation of fans and the hiring of certified foremen in mines to protect the health and safety of the miners.]

How far can the state go in the exercise of its police power and that exercise be not deemed unreasonable? . . . if the state can police the towns and cities within its borders, why may it not police the coal mines? The statute, having for its object the preservation of the health and lives of

men working in a business so hazardous and so fraught with peril, should not be held unconstitutional unless it is clearly so. We think it is generally recognized that such legislation is within the scope of the police power of the state. . . .

As applied to the coal-mining business generally, we have no hesitation in saying that the requirements of the statute are reasonable and necessary, and a proper exercise of the legislative function. . . .

DANIELS *v.* HILGARD

Supreme Court of Illinois. 1875.
77 Ill. 640.

MR. JUSTICE SHELDON delivered the opinion of the Court:

This was an action brought under . . . the "act providing for the health and safety of persons employed in coal mines," Rev. Stat. 1874, p. 704. . . . The first section of the act requires that the owner or agent of every coal mine or colliery in this State employing ten men, or more, shall make, or cause to be made, an accurate map or plan of the workings of such coal mine or colliery, etc., and deposit a copy thereof with the inspector of mines, and also with the recorder of the county. . . . Our legislature, in an act having for its avowed object the providing for the health and safety of persons employed in coal mines, has thought it proper to in-

corporate this provision for the making of a map. The law-making powers elsewhere, as it is seen in their laws for the same object, have adopted this same provision. This would seem to indicate as the legislative understanding, that the provision is one in aid of the accomplishment of the purpose of such acts—the protection of persons engaged in such mines; a proper part of the system adopted to that end. The question is properly one of legislative determination.

A court should not lightly interfere in such case. The legislature must have manifestly transcended its province, for it to do so. We are of opinion that it is not for a court to say, that the provision here, which is called in question, is anything

more than a fair and reasonable police regulation with reference to the subject matter of the act, which the legislature, in

its discretion, has seen proper to adopt; and that it should not be set aside as unconstitutional. . . .

PATTERSON *v.* STATE

Criminal Court of Appeals of Oklahoma. 1912.
7 Okl. Cr.; 124 Pac. 942.

[The issue in this case is the constitutionality of a statute which requires mine operators to employ shot-firers and provides that the shots are to be fired at the end of every shift and not until all miners and other employees working in the mines are out of the mine.]

The police powers of a state extend to the protection of the lives, limbs, and health of all persons, and the protection of all property, within the state, and by which persons and property are subjected to all kinds of restraints and burdens for the protection of life, person and property, in order to secure the general comfort, health, and prosperity of the state.

There can be no question that this legislation is a proper and appropriate exercise of the police power. The plain purpose of the act is to protect, so far as

legislative enactments may, the lives and persons of the men employed in the mines of the state while they are in the mines. The mining of coal is unquestionably dangerous and hazardous work, and in this state it is a productive industry of vast importance. Thousands of men are engaged in that character of work, and a proper safeguard of their lives and health is a matter of humane necessity. No subject can be mentioned where there is a more positive necessity for the exercise of the police power than in seeking to subserve their safety. This duty has been recognized and entered upon as evidenced by our mining laws, intended to insure, as far as practicable, the safety and health of the miner while engaged in his dangerous and hazardous occupation. . . .

BOOTH *v.* INDIANA

Supreme Court of the United States. 1915.
237 U. S. 391; 35 Sup. Ct. 617; 59 L. Ed. 1011.

MR. JUSTICE MCKENNA delivered the opinion of the Court. . . . [An Indiana statute of 1907 required owners and operators of coal mines, collieries, and places where conditions prevail similar to those in coal mines, to provide suitable wash-rooms upon written request of at least 20 employees, or one-third of the employees where fewer than 20 are employed.]

The specifications under the Fourteenth Amendment are: (1) That the statute deprives plaintiff in error of his property without due process of law; and (2) denies him the equal protection of the law. . . .

The first objection in the case at bar seems to be that the statute "applies solely and specifically to a particular class, engaged in a particular business, and is not in the interest of the public generally, as distinct from a particular class." And it is further said that "it is a matter of common knowledge, of which courts take judicial notice, that the 'class' to which the act applies constitutes a very small percentage of population, and this being true, the act could not possibly be in the interest of the public health of the commonwealth."

The objection is answered by the cases

already cited, by *Holden v. Hardy* . . . and *McLean v. Arkansas*. . . .

But a distinction is sought to be made between what a legislature may require for the safety and protection of a miner while actually in service below ground, and that which may be required when he has ceased or has not commenced his labors. Cases are cited which, upon that distinction, have decided that when a miner has ceased his work and has reached the surface of the earth his situation is not different from that of many other workmen, and that, therefore, his rights are not greater than theirs, and will not justify a separate classification.

We are unable to concur in this reasoning, or to limit the power of the legislature by the distinctions expressed. Having the power, in the interest of the public health, to regulate the conditions upon which coal mining may be conducted, it cannot be limited by moments of time and differences of situation. The legislative judgment may be determined by all of the conditions and their influence. The conditions to which a miner passes or returns from are very different from those which an employee in work above ground passes to or returns from, and the conditions of actual service in the cases are very different, and it cannot be judicially said that a judgment which makes such differences a basis of classification is arbitrarily exercised; certainly not in view of the wide discretion this court has recognized, and necessarily has recognized, in legislation to classify its objects.

It is further said that the act "is inoperative in itself for the reason that it can only be put into operation by the will and election of a specific number of the 'class' to which it applies, and consequently it fastens a burden upon the owners and operators of coal mines, which is 'a manifest injustice by positive law.'" The purpose of the comment, other than to give accent to the contention that the act has special operation, is part of the view else-

where urged that the provision is a delegation of legislative power. But with this objection we are not concerned. The supreme court of the state decided that the law could be called into operation by petition, and in the decision no Federal question is involved.

It is, however, further objected that the law discriminated because it may be applied to one mine, and not to another, all other conditions being the same but the desire of the miners,—indeed, discriminates upon a distinction more arbitrary than that, upon the desire of twenty in one mine as against a lesser number, nineteen, it may be, in another. The objection is a familiar one and has an instance and answer in *McLean v. Arkansas*, *supra*. It is the usual ground of attack upon a distinction based on degree, and seems to have a special force when the distinction depends upon a difference in numbers.

But there are many practical analogies. The jurisdiction of a court is often made to depend upon amounts apparently arbitrarily fixed. For instance, the jurisdiction of the district court of the United States (formerly the circuit court) is limited to civil suits in law and equity in certain instances in which the amount in controversy is \$3,000. It could be objected, as it is here objected, that the amount is arbitrary, and that there cannot be any difference in principle between suits for \$3,000 and suits for \$2,999,—a distinction dependent upon \$1. Indeed, in more acute illustration, the distinction may be made of 1 cent only. And so might there be objection to any amount which might be selected, as it might be also to any number of petitioning miners which the legislature of Indiana might have selected. Indeed, would not an objection have the same legal strength if the law had been made to depend upon anything less than unanimity of desire? To require that, it might well have been thought by the legislature, would render the legislation nugatory, and that a lesser number would

call it into exercise and attain its object. The conception, no doubt, was that a lesser number—indeed, the number selected—would be fairly representative of the desire and necessity of the miners, and that use would breed a habit, example induce imitation, and a healthful practice starting with a limited number might become that of all. And such consummation justified the effort, the manner adopted attaining the end sought as well as, if

not better than, a direct and peremptory requirement of the miners and mine owners. The choice of manner was, under the circumstances, for the legislature. . . .¹

¹ See also *People v. Solomon*, 265 Ill. 28, 106 N. E. 458 (1914), *State v. Reaser*, 93 Kan. 628, 145 Pac. 838 (1915), *Princeton Coal Co. v. Fettinger*, 185 Ind. 675, 113 N. E. 236 (1916), *People v. Cleveland, etc. Ry. Co.*, 288 Ill. 523, 123 N. E. 579 (1919), and *People v. Eno*, 119 N. Y. Supp. 600, 134 App. Div. 527 (1909).—E.S.

CHICAGO, B. & Q. RAILROAD *v.* ILLINOIS COMMERCE COMMISSION

Supreme Court of Illinois. 1936.
364 Ill. 213; 4 N. E. (2d) 96.

JONES, J. . . . [The Illinois Commerce Commission ordered the railroad to construct a stairway so that it would not be necessary for employees to cross the tracks in going to and from the yardmaster's office, one employee having been killed while crossing the track.]

It is to the interest of the state to have strong, robust, healthy citizens capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose by protecting employees are held to have an obvious connection with the public welfare. The physical welfare of the citizen is a subject of so much importance to the state, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power. . . . Under the police power the Legislatures of the different states have enacted laws for the safety of workmen by providing for fire escapes, inclosing dangerous machinery, regulation of passenger

and freight elevators, health measures, factory and mine inspection and regulation, and other means of safeguarding employees. It is as much a matter of public welfare to protect employees from injury as it is to conserve their health. In addition to the protection afforded workmen, such measures promote the general welfare by tending to prevent employees from becoming public charges by reason of accident or disease contracted through their employment. The police power is inherent in the state. In the exercise of this power, the Legislature may enact laws which promote the general welfare, even though such laws interfere with the liberty or property of an individual, and every presumption is in favor of the validity of such acts. . . . Sections 50 and 57 of the Public Utilities Act expressly authorize regulations for the safety of employees. The order is within the terms of the statute, and the subject matter is of public interest. . . .

BEAUMONT TRACTION COMPANY *v.* STATE

Court of Civil Appeals of Texas. 1909.
57 Tex. Civ. App. 605; 122 S. W. 615.

REESE, J. . . . [A law of 1903 required corporations operating electric car lines to screen the forward end for the protec-

tion of the motorman from wind and storm.]

We think it cannot reasonably be ques-

tioned that the restrictions upon the business of operating electric cars imposed by the act are entirely proper and well within the recognized police power of the state, and would not be subject to the constitutional objection that any person is thereby deprived of the equal protection of the law guaranteed by the federal Constitution or that equity of legal rights protected by the Constitution of this state, if the act operated equally upon all engaged in such business; but to single out corporations engaged in such business and impose

upon them, as a class, restrictions from which all persons or associations of persons other than corporations, engaged in the same business, under the same conditions, are exempt, is a violation of the provisions of both the fourteenth amendment of the federal Constitution and of article 1, §3, of the Constitution of this state. . . .¹

¹ See also *State v. Nelson*, 52 Ohio St. 18, 39 N. E. 22 (1894).

CHICAGO & N. W. RAILWAY *v.* RAILROAD & W. COMMISSION

U. S. District Court (Minnesota). 1922.

280 Fed. 387.

[The problem in this case is the constitutionality of a law requiring companies engaged in the construction or repair of railroad cars to erect and maintain buildings where work is to be done.] The prohibition of paint-spraying machines within the proposed sheds is claimed to be unreasonable, purely arbitrary, and not a valid exercise of the police power of the state. The evidence shows that at one time the use of such machines was

thought to be deleterious to health on account of certain ingredients contained in the paint. But the evidence further shows that these ingredients are not found in the paint used at present, and furthermore . . . the state itself makes use, upon its own work, of these same paint-spraying machines. . . . Under these circumstances I am of opinion that the prohibition of the use of such machines is not a valid exercise of police power. . . .

CASPAR *v.* LEWIN

Supreme Court of Kansas. 1910.

82 Kan. 604; 109 Pac. 657.

BURCH, J. . . .

This court has nothing to do with the policy of the factory act of this state, except to apprehend and give effect to it, or with the rigor of its requirements. Therefore it holds that it makes no difference whether the duty be ordinary and general or exceptional and occasional. If a person employed or laboring in a manufacturing establishment may, at the behest of duty, come in proximity to one of the appliances specified in the statute, it must be properly and safely guarded for

the purpose of preventing or avoiding death or injury to him.

Common experience everywhere, registered in tables of gruesome statistics, affords fresh demonstration every day of the inadequacy of the common-law doctrine of reasonable care to provide places and instrumentalities reasonably safe against foreseeable occurrences to meet the situation of men, women, and children who must manipulate, and must work in the midst of, the mechanical products of modern inventive genius. But

when the Legislature intervenes and makes the positive requirement that specific safeguards shall be maintained, the statute is too often treated as a legal superfluity, and cases are decided according to the same old rules. So in this case, the defendants want to try the question whether they should reasonably have anticipated that Caspar would be killed, notwithstanding the specific and positive command of the statute that a belt shifter or other safe mechanical contrivance for putting on the belt should be provided, and that the shafting should be properly and safely guarded.

It is impossible for a factory owner or operator to foresee all the natural and probable results of his omissions. After an injury occurs he recognizes that his failure to adopt some protective measure caused the injury. Therefore it is the law that if a reasonable man would have foreseen that injury in some form was likely to result, and injury does result, he is liable although the precise form of the injury was not foreseen. The factory act

cuts squarely across the common-law doctrine of reasonable prudence and supplies that foresight in reference to the places, structures, and appliances which it specifies. The Legislature did not say, as in Connecticut and Massachusetts, that shafting so placed, as in the opinion of the factory inspector, to be dangerous to employes, shall be guarded or as in Wisconsin, that shafting so located as to be dangerous to employes shall be guarded. It said that all shafting used in a manufacturing establishment shall be guarded; and whenever a required safeguard or appliance has not been provided the only question open to investigation is whether the injury occurred under circumstances which made the absence of it a contributing cause. In those instances in which practicability is a factor that matter may be tried, but to submit to a jury the question of prudence and foresight where the law has been ignored would be to reopen a subject which the Legislature has closed by a final decision. . . .

ATHENS HOSIERY MILLS *v.* THOMASON

Supreme Court of Tennessee. 1921.

144 Tenn. 159; 231 S. W. 904.

McKINNEY, J. . . .

Taking the act as a whole, it is apparent that the Legislature had in mind the creation of a bureau of workshop and factory inspection for the purpose of regulating such institutions as fall within its purview, looking to the preservation of the life and health of those employed therein.

With this object in view said bureau was charged with the duty of seeing that the premises of such establishments are kept in a sanitary condition; that a proper sewerage system is maintained; that the rooms in which the work is carried on are properly heated, lighted, and ventilated; that proper exits in case of fire or

other disasters are provided; that the machinery is not so located as to be dangerous to employees when engaged in their ordinary duties; that certain safeguards are provided for the prevention of accidents, etc.

All of the foregoing provisions are contained in section 5, and undeniably tend to preserve the life and health of the employees. The sections complained of are, in the main, amplifications of section 5. Section 9 provides for proper ventilation to avoid injury to health.

It is only necessary to read the other sections complained of to see that they fall within the same category.

As previously stated, the purpose of the

entire act was the preservation of the life and health of the large body of our citizens who work in such institutions, and in order to effectuate that intention the department of workshop and factory inspection was created with the power to inspect and regulate such institutions.

...
The act in question is a police regulation, enacted for the preservation of the

life and health of those working in the establishments enumerated therein. The Legislature had the right to require the payment of reasonable fees for the purpose of providing a fund for defraying the costs of maintaining the bureau. The fact that a surplus remains after the payment of all expenses will not affect the validity of the act. . . .

BUTERA *v.* MARDIS

Supreme Court of Nebraska. 1916.
99 Neb. 815; 157 N. W. 1024.

SEDGWICK, J. The defendant, the J. C. Mardis Company, contracted to erect a building called the "Flat Iron Building" on a lot of the defendant Sterling Realty Company, in Omaha. The deceased was in the employ of the Mardis Company and was killed by the fall of a load of material suspended by means of a derrick or crane over the walk. His widow, Giovanna Butera, brought this action for damages and recovered judgment in the district court for Douglas county against the J. C. Mardis Company and the Sterling Realty Company, jointly. The defendants have appealed separately.

(1) The Sterling Realty Company contends that the statute, so far as it makes the owner of the lot on which the build-

ing was being erected liable, is unconstitutional. . . . When the owner of real estate makes a contract for building thereon, he can in that contract protect himself against any misconduct or neglect of the contractor and can require such guaranty as he deems necessary for his protection. If this statute affects the right of free contract, or if the public benefit that comes from protecting laboring men against the dangers of their employment will not justify such legislation, such questions of public policy, if doubtful in their application, are for the Legislature and not for the courts. We conclude that this legislation does not violate our fundamental law. . . .

JONES *v.* RUSSELL

Court of Appeals of Kentucky. 1928.
224 Ky. 390; 6 S. W. (2d) 460.

WILLIS, J. The Legislature at its session in 1926 passed an act to require the proper construction, use, and maintenance of scaffolding, counterfloors, staging, rigging, etc., in all construction work in cities of the first and second classes, and to provide for the appointment and to prescribe the duties of a chief and deputy safety inspector of scaffolding and counterfloors in such cities. . . .

It is apparent from the provisions of the statute that it was enacted under the police power of the state to promote the safety of workmen engaged in construction work which required them to make use of the structures described in the statute. It is not disputed that the safety of workmen engaged in hazardous employments is a legitimate subject of legislation under the police power of the state.

The essential predicate of the police power is the health, morals, safety, and general welfare of the people. The courts do not undertake to define the limits, or mark the boundaries, of that power, but, by a process of inclusion and exclusion, await the impact of facts unforeseen, and develop the doctrine in the light of events and experience. . . .

* * * *

The major objection to the statute on constitutional grounds was that it violated the

"equal protection" clause of the Constitution in that it applied only to cities of the first and second classes. To this the court said that the classification was reasonable in that hazards are likely to be greater in more populous centers. "Many workmen engaged on scaffolds prepared for them by others may require protection, whilst in smaller place the danger may be guarded against by the workmen themselves, rendering regulation unnecessary. The expense of regulation may also furnish a reason for applying it only where the industry is of sufficient magnitude to justify and provide the necessary expenditures."

GREENE v. FISH FURNITURE COMPANY

Supreme Court of Illinois. 1916.
272 Ill. 148; 111 N. E. 725.

The Supreme Court of Illinois in this case affirmed the constitutionality of Section 14 of the Factory Act which provided that "In all factories, mercantile establishments, mills or workshops, sufficient and reasonable means of escape in case of fire shall be provided, by more than one means of egress, and such means of escape shall at all times be kept free from any obstruction and shall be kept in good repair and ready for use. . . ." The company charged that the act was discriminatory.

* * * *

Do the kinds of industry mentioned in said section 14 form a class by themselves with reference to the protection of employes, so as to justify the Legislature in making provisions for furnishing means of escape from fire which do not apply to other branches of industry. The difference between the employer's liability to his employes and to his customers is plainly a reasonable one. . . . A customer is apt to be in a mercantile establishment only for a brief period at a given time, while employes are there during all working hours, every week day. A customer is usually in that part of the establishment to which access and from which egress are

made easy to invite visits from the public, while employes . . . may be in parts of the establishment from which egress is often much more difficult. . . . We are of the opinion that the distinction between factories, mercantile establishments, mills, and workshops and such business and commercial establishments as are referred to by counsel for plaintiff in error is also reasonable and not an arbitrary classification. It is clearly based on the fact that the danger in such establishments as specified in section 14 is apt to be much greater than the other establishments mentioned by counsel. The evidence in this case forcibly illustrated how conditions will differ in establishments of this character from what would be almost certain to exist in a large railroad office or commercial agency. . . . Under the reasoning of decisions on similar questions we think the classification here in question would be considered as reasonable and within the constitutional requirements. . . .¹

¹ See also *Lichtenstein v. Fish Furniture Co.*, 272 Ill. 191, 111 N. E. 729 (1916), *Dotson v. Louisiana Central Lumber Co.*, 144 La. 78, 80 So. 205 (1918).

GLANGES *v.* STATE

Court of Criminal Appeals of Texas. 1920.
87 Tex. Cr. R. 158; 220 S. W. 95.

MORROW, J. . . . The prosecution is for violation of the provisions of chapter 56 of the Acts of the Thirty-Fourth Legislature (Vernon's Ann. Pen. Code 1916, arts. 1451h-1451m), the specific charge being that the appellant, a keeper of a restaurant, "did fail and refuse to provide and furnish suitable seats to be used by his female employes when not engaged in their active duties," and that he did not give notice to all of the females so employed by posting in a conspicuous place notice described in the statute.

In motion to quash the indictment, attacks are made upon the validity and

constitutionality of the law. We are furnished with no brief or citation of authorities supporting the criticism, and we are aware of no reason that the act is not a lawful exercise of legislative authority. The right of the Legislature, in the exercise of the police power, to pass laws to safeguard the health of women employees has been so often affirmed by the courts that it cannot now be considered an open question. . . . We find nothing in the provision questioned in the present law which would condemn it as unreasonable. . . .

BOLL *v.* CONDIE-BRAY GLASS & PAINT COMPANY

Supreme Court of Missouri. 1928.
321 Mo. 92; 11 S. W. (2d) 48.

GENTRY, J. . . . [Sections 6817, 6818, 6819, 6825, and 6827 of the Revised Statutes of Missouri of 1919 provide that employers are to provide approved and effective devices, means, or methods for protecting their workers against noxious and poisonous fumes, dusts, etc. These sections are challenged as unconstitutional.]

It is a fact generally known, and courts will take judicial notice of it, that the inhaling of fumes, dust, and gases, which result from the mixing of substances used in the manufacture of paint, will produce what is generally known as "painter's colic," that the disease is accompanied by great pain and often results in permanent injury to the person afflicted therewith. An enlightened state is interested in the protection of the health, the lives, and limbs of all its citizens, especially of those who are dependent upon daily labor for their support. In holding the statute constitutional, which

requires belting, shafting, machines, machinery, gearing, and drums in all manufacturing establishments to be safely and securely guarded, this court said that the constitutionality of such laws is no longer in doubt; and it also said that statutes providing for fire escapes, inspection of boilers, ventilation of mines, for covering and otherwise protecting machinery, are also constitutional. . . . And this court also held that the statute requiring that the openings of all hatchways, elevators and well-holes upon every floor of a manufacturing establishment shall be protected was constitutional. . . .

Learned counsel insist that sections 6817, 6819, 6825, and 6827 . . . are unconstitutional. . . . In view of the authorities above mentioned . . . and in view of the benefits to be derived therefrom by all the employees in such manufacturing establishments, we have no hesitation in holding that sections 6817, 6819, 6825, and 6827 . . . are constitu-

tional, and that they are a reasonable exercise of the police power of the state. Health measures and measures for the protection of the lives and limbs of employees have very properly been held to

be legislation of the highest type and indicative of the desire of an enlightened people to help those who are in need of such assistance. . . .

BOSHUIZEN *v.* THOMPSON & TAYLOR COMPANY

Supreme Court of Illinois. 1935.

360 Ill. 160; 195 N. E. 625.

HERRICK, J. . . . Section 1 of the Occupational Diseases Act is as follows: "That every employer of labor in this State, engaged in carrying on any work or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employees to the danger of illness or disease incident to such work or process, to which employees are not ordinarily exposed in other lines of employment, shall, for the protection of all employees engaged in such work or process, adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process." . . .

It is well to observe that section 1 does not attempt to state what "devices" the legislative mind contemplated—whether respirators, masks, a certain system of ventilation, or other mechanical devices. Did the Legislature by the words "means and methods" intend to prescribe stated medical examinations, limited hours of labor, construction of a type of building or structure to permit the maximum amount of sunshine and ventilation in

the rooms or places where the labor was performed, or other different means or methods? The answer to this interrogatory, if the act is valid, must be found in section 1. To be valid the statute must prescribe a standard so definite, fixed, and understandable as to permit a compliance therewith by one who desires to meet its requirements. . . .

Under section 1 the employer must be able to forecast accurately the devices, means, and methods required of him to avoid liability under the statute. . . . It would be unjust to hold the employer liable in the exercise of his business knowledge for his failure to guess correctly as to his duty under section 1 where the statute itself creates no criterion for his safe and sure guidance. Its provisions are so vague, indefinite, uncertain, and incomplete that no sufficiently clear and intelligible standard of duty is defined thereby. A statute which requires the performance of an act in terms so indefinite, uncertain, and puzzling that men of ordinary intelligence must necessarily guess at its meaning and differ as to its application transcends due process of law. . . .

VALLAT *v.* RADIUM DIAL COMPANY

Supreme Court of Illinois. 1935.

360 Ill. 407; 196 N. E. 485.

FARTHING, J. . . . The complaint alleged that long prior to, and in May, 1929, defendant was manufacturing illuminated dials, etc., and plaintiff was its

employee. Her work was painting dials with a luminous paint. The paint contained radium. . . . It is alleged that particles of dust, consisting largely of

radium, were thrown off, and that plaintiff inhaled, swallowed, and otherwise took into her system these particles. It is alleged that plaintiff, as such employee, was thus subjected to danger of illness and disease incident to such work to which employees in other lines of employment are not ordinarily exposed, and that radium's harmful results are anemia, rarefaction of the bones, alveoli of the jaws, and other bone complications and disorders. The complaint charged that defendant carelessly and negligently failed to provide reasonable and approved devices, means, or methods for the prevention of such occupational diseases . . . that by reason of the conditions described under which plaintiff was compelled to work, and as a result of such negligence of defendant, plaintiff contracted anemia, rarefaction of the bones, etc., above set out. . . .

The Occupational Diseases Act is designed to ameliorate harmful and dangerous working conditions, and is humanitarian in purpose. Like all statutes, it should be sustained as a valid enactment if this can be done, and it should be declared to be unconstitutional only if . . . it is found that the Legislature has gone beyond its powers or has failed to enact an intelligible and valid law.

It is contended that those words in section 1 which are under fire, "reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process," do not meet the requirements of "due process of law," but are vague, indefinite, and do not furnish any intelligible standard of conduct to be observed by employers. . . .

In order that a statute may be held valid, the duty imposed by it must be prescribed in terms definite enough to serve as a guide to those who have the duty imposed upon them. Such definiteness may be produced by words which

have a technical or other special meaning well enough known to permit compliance therewith or words which have an established meaning at common law through decisions; but if the duty is imposed by statute through the use of words which have not yet acquired definiteness or certainty and which are so general and indefinite that they furnish no such guide, the statute must be declared to be invalid. When it leaves the Legislature a law must be complete in all its terms, and it must be definite and certain enough to enable every person, by reading the law, to know what his rights and obligations are and how the law will operate when put into execution. . . . If the statute leaves it to a ministerial officer to define the thing to which the statute is to be applied, and if the definition is not commonly known in the modes already pointed out, the act becomes invalid, because it creates an unwarranted and void delegation of legislative power. . . .

No definitions are cited which contain definitions of the words "reasonable and approved devices, means or methods," and it is not contended that this phrase has a common-law meaning or a generally accepted meaning, or that the act itself furnishes a clear, definite, and certain enough meaning to know what norms of conduct and what standard of equipment are intended by section 1. . . . What, then, is the sense in which "reasonable" is to be taken? Is it reasonable in care, price, size, adaptability, co-ordination with factory or plant or reasonable in results? Who is to be the one to say what devices, means, or methods are "approved"? . . .

There is no question as to the need and imperative right that men, women, and children engaged in such occupations should be guarded against destruction or impairment of health. This end must be obtained by laws that are themselves a protection, and it is not a compliance

with the due process provisions of our fundamental law if the duty be put upon employers without some accurate and

definite chart and compass to guide them towards the humane results intended. . . . Section 1 is therefore void.

II. FULL-CREW LEGISLATION FOR RAILROADS

Special types of legislation have been enacted for railroads, such laws including provisions that at least a minimum number of men be employed in the operation of trains. There have also been efforts to limit the size of trains. Ostensibly the purpose of such laws is to protect the safety both of the public and of the employees engaged in train operation. Critics have suggested, however, that their primary purpose is to compel railroads to hire more men than necessary in order to provide fuller employment.

* * * *

Full-crew laws are now on the statute books of over 20 States. The majority of these statutes regulate the minimum number of employees required for the operation of different classes of trains, but the States of Connecticut, Maryland, Massachusetts, New Jersey, and West Virginia provide for a determination by the public utilities commission or similar agency. Massachusetts, in addition, provides for the regulation of brakemen. The laws of Maine and South Carolina apply only to brakemen, while in Louisiana the regulation applies to switching crews.

The railroads have strenuously opposed these laws, contending that the general improvement in the methods of handling trains has mitigated the need for larger crews. The trainmen, however, point out that the increase in the weight of trains has added to the strain upon railway employees and that full-crew legislation greatly reduces this physical strain and consequently reduces the frequency of accidents.

In 1911 the United States Supreme Court, in the case of *Chicago, Rock Island & Pacific Ry. Co. v. State of Arkansas* (219 U. S. 453), upheld the full-crew law of Arkansas enacted in 1907 (Act No. 116), which required railroads whose lines were not less than 50 miles in length to have at least three brakemen in every crew of freight trains of 25 cars or more. The action in this case was brought by the State and alleged that the railroad company had operated a freight train of more than 25 cars without the required number of brakemen. The company defended on the ground that the act conflicted with the Fourteenth Amendment and with the commerce clause of the United States Constitution. These objections were overruled by the Supreme Court of Arkansas and the law was held constitutional. This decision was affirmed by the United States Supreme Court. It was the opinion of the Court that the law should be taken as having been enacted, not in obstruction, but in aid, of interstate commerce "and for the protection of those engaged in such commerce." The Court pointed out that Congress had not legislated on the subject of full crews for interstate trains, and therefore the State statutes, "which really relate to the rights and duties of all within the jurisdiction, must control. This principle has been firmly established, and is a most wholesome one under our systems of government, Federal and State." In a later case,² decided April 3, 1916, the Supreme Court of the

¹ *Monthly Labor Review* (June, 1940), pp. 1429-1434.—E.S.

² *St. Louis, Iron Mountain & Southern Railway Co. v. Arkansas*, 240 U. S. 518 [36 Sup. Ct. 443, 60 L. Ed. 776 (1916)].

United States upheld a statute of Arkansas, passed in 1913 (Act. No. 67), which required not less than three helpers in switch crews in yards located in cities of the first and second classes operated by railroad companies having lines of at least 100 miles in length. In upholding the act, the Court compared this case with the previous one and declared that there was no distinction between the statutes as the principal object of both is public safety, although "the urgency in one may not be as great as the urgency in the other."

Both of these Arkansas statutes were again considered by the United States Supreme Court in the case of *Missouri Pacific R. R. Co. v. Norwood* (283 U. S. 249), the railroad company having filed an action to enjoin the enforcement of the statutes. The previous decisions upholding the constitutionality of the acts were referred to by the Court in an opinion by Mr. Justice Butler. The company, however, contended that conditions had changed since these decisions and that equipment had been improved to such an extent that longer and heavier trains could be operated more safely than smaller trains could be operated at the time of the former decisions. Furthermore, the company declared that the standard practice of railroads, except in the State of Arkansas, was to operate without the extra switchmen and brakemen required by the Arkansas statutes. In answering these contentions, the Court said that there was nothing to show that the dangers to the employees and the public had been lessened by the improvements in road and equipment, and that "the same or greater need may now exist for the specified number of brakemen and helpers in freight-train and switching crews." The Supreme Court took judicial notice of the fact that laws similar to the Arkansas act existed in other States, and stated that, "so far as constitutionality is concerned, the facts alleged

are not sufficient to distinguish this case from those in which this Court has sustained these laws."

The railroad company also alleged that Congress, by the Interstate Commerce Act, as amended in 1920, had authorized the Interstate Commerce Commission to regulate the number of brakemen and helpers. The Supreme Court, however, after considering the provisions of the act, concluded that Congress had not delegated such authority to the Commission, and therefore affirmed the decree of the lower court dismissing the case.

In a decision rendered on November 27, 1939,³ the Supreme Court of Pennsylvania declared the full-crew law of that State, which required the placing of an extra brakeman on every passenger train having more than 5 cars, and on freight trains of more than 50 cars, to be unconstitutional as applied to the Pennsylvania Railroad Co. The court, however, did not rule upon the constitutionality of the law as affecting other railroads. The case had been before the court in 1938 (198 Atl. 130), but was remanded to the lower court since all the parties to the case had not been heard.

The court was of the opinion that the law deprived the railroad of its property in violation of the State constitution, but that it did not violate the commerce clause of the United States Constitution. The court also declared that the alleged danger of accidents without such legislation was highly speculative, and concluded that the resultant effectiveness of such a law under these circumstances, "could only be out of all reasonable proportion to the cost involved."

The Circuit Court of Appeals for the Eighth Circuit recently declared that a railroad which employed as brakeman a colored man designated as "brakeman and porter" had sufficiently complied

³ *Pennsylvania R. R. Co. v. Driscoll*, [336 Pa. 310], 9 Atl. (2d) 621 [1939].

with the Nebraska full-crew law.⁴ This law required all trains of more than 5 cars to have a crew of not less than one engineer, one fireman, one conductor, one brakeman, and one flagman, and those of less than 5 cars to have a crew of one engineer, one fireman, one conductor, and one brakeman or flagman.

In holding that the railroad corporation had complied with the law, the court pointed out that the colored men classified as "brakeman-porter" had passed all mental and physical requirements set up for the qualification of brakemen and flagmen, and that in addition to performing the brakeman's work, they also worked as porters when their other duties permitted. The court also observed that the act "is a safety measure and not one primarily in the interest of any particular employees or class of employees," and, in conclusion, held that the railroad had complied "with both the letter and the spirit of the act."

The Congress of the United States has considered the enactment of a Federal full-crew law several times. A bill of this kind (S. 59, 74th Cong., 1st sess.) was introduced in the Senate of the United States in 1935. This bill required that all common carriers by railroad engaged in interstate or foreign commerce should be manned with competent employees on all locomotives, trains, and other self-propelled engines or machines, and also prescribed the least number of men that may be employed on such locomotives, etc., and the qualifications of the employees. To date no Federal legislation has resulted.

Due to the belief that the matter of regulating train lengths should be left to Congress, since many of the trains operating in the United States cross State lines, attempts to secure State legislation on the subject have met with little suc-

cess. At present this type of legislation exists in only four States (Arizona, Louisiana, Nevada, and Oklahoma).

The first law limiting the number of cars in a railroad train was enacted by Arizona in 1912, followed by Louisiana in 1916, Nevada in 1935, and Oklahoma in 1937. All of the laws limit the number of freight cars in a train, and, in addition, the laws of Arizona and Louisiana limit passenger trains to 14 cars and 16 cars, respectively.

On March 8, 1933, in the case of *Atchison, Topeka & Santa Fe Ry. Co. v. La Prade* (2 Fed. Supp. 855), the United States District Court for the District of Arizona held the Arizona train-length law invalid. The court stated that the subject "is national in its character, requiring uniformity of regulation, and that the power to so regulate is exclusively conferred upon Congress by the commerce clause of the Constitution."

In 1937, the District Court of the United States for the District of Nevada held that the railroad was entitled to enjoin the enforcement as to interstate commerce of the Nevada law limiting train lengths.⁵ Court orders have also been granted in Louisiana and Oklahoma restraining the enforcement of the train-length laws.

Bills limiting the length of trains have been introduced¹ in the Congress of the United States from time to time, and in 1935 hearings were partially held on the proposed legislation. A bill (S. 69), known as the train-length bill, was introduced in the first session of the Seventy-fifth Congress. This bill limited the length of freight or other trains, exclusive of caboose, to 70 cars. The bill was passed by the Senate on July 22, 1937, and on January 11, 1938, the House Committee on Interstate and Foreign Commerce began hearings on the bill, but no legislation has resulted.

⁴ *Beal v. Missouri Pac. R. Corporation in Nebraska*, 108 Fed. (2d) 897.

⁵ *Southern Pacific Co. v. Mashburn*, 18 Fed. Supp. 393.

III. INDUSTRIAL HOME WORK

THE LEGISLATION AND ITS ADMINISTRATION¹

The distribution of manufacturing work to be done in private homes has persisted in this country in spite of all efforts to control it. The inherent abuses of the practice are many. The employer, by giving out industrial home work, is able to expand or contract his working force at short notice without the responsibility, or the expense, of maintaining throughout the entire year factory space and equipment to meet the demands of a peak load. Thus he avoids the responsibility for overhead costs of production—for rent, lighting, heat, and, in some industries, even for machinery and findings.

The industrial home worker, on the other hand, must provide work space in his or her own home. If the process requires it, she must furnish her own sewing machine and pay for repairs. She must buy needles with which to sew, oil for greasing the machine, thread, and other incidentals, which the employer now provides without question when the work is performed in a factory. Frequently she is required to call for the work and to return it to her employer, thus adding the cost of transportation to the expenditures, which have already eaten materially into her meager earnings.

There are times during dull periods when home workers have no work whatsoever in their homes. On the other hand, when the busy season comes, frequently the time allowed for finishing the products is so short that it is only by working long, tedious hours and sometimes far into the night that the home worker is able to comply with the demands of

the employer. Women—many of them housewives with the responsibilities of home and family also to meet—constitute a large proportion of those who perform factory work in their homes, but frequently the completion of the allotment becomes a family affair, and all available hands, including those of young children, are put to the task of performing the work.

Rates paid for home work are practically always less than those paid the factory worker, and the earnings of home workers, even for full-time employment, are, in most instances, pitifully low. Many families whose members are employed by industry to work in their homes have been carried on the public relief rolls.

The savings accruing to the home-work employer make it difficult, and in some instances impossible, for his competitor who produces in a factory to maintain fair standards of hours, wages, and working conditions.

As recent experience has disclosed, however, the home-work employer himself shares in the damaging results of the home-work system. The following is quoted from the 1934-36 report of the Connecticut Department of Labor and Factory Inspection, in which some of the results of the 1935 prohibitory law are discussed:

Apparently industry has made the adjustment to the new regulations without major difficulties. Basically, this must be due to the fact that home manufacture is an outmoded means of production; the modern factory method has proved more efficient than these residual instances of home work, as it did in the manufacture of many other products where home labor was abandoned generations ago. It is probable that some increase in production costs has resulted in certain plants, especially those which paid the lowest wages. However, several employers have told the department investigator that they now prefer to have all the work done

¹ *Industrial Home-Work Legislation and Its Administration*, U. S. Department of Labor, Division of Labor Standards, Bulletin No. 26 (Washington: Government Printing Office, 1940), pp. 1-10.—E.S.

in the factory because it is performed far more efficiently there.²

For more than a century industrial home work has been recognized in this country as a social and economic evil. No industrial practice has called more clearly for legal regulation. Its abuses—the exploitation of the workers engaged in the practice, the direct competition with factory production and the undercutting of factory standards, the use of public relief funds to bring the home worker's income to a subsistence level, the employer's evasion of his responsibilities under the law through resorting to home work—are important factors which make strict control essential. Industrial home work, however, has defied attempts at regulation.

The reasons for the difficulties of regulation are obvious. The relation between employer and home worker, and even the actual distribution of the goods, are frequently difficult to trace. The worker may live near the plant or at a great distance. She may live in an entirely different part of the same State, in a remote rural district, or even in another State than that in which her employer has his place of business. She may call for work directly at the plant, or it may reach her through a contractor or a series of contractors, or by truck or express, or through the mails. At times the worker does not even know the name of the employer or firm from whom she obtains her work.

For purposes of enforcement, it has been found virtually impossible to ascertain the exact hours worked by industrial home workers or whether children are helping to complete the assignments. In most instances, attempts to enforce minimum-wage rates with respect to industrial home work have been without avail, particularly in the highly industrial States in which home work has been firmly entrenched for many years. Fre-

quently the home-work operations are not identical with those in the plant, and a separate investigation becomes necessary before rates may be set. In addition, many of the home-work industries are also so-called style industries, and often it has been impossible to determine and apply the rates quickly enough to meet the rapid changes in style and fashion that are characteristic of these industries.

Experienced administrators of home-work legislation, as well as organized labor, are of the opinion that if its abuses are to be eliminated, the home-work system itself must be abolished.

Limited attempts to regulate industrial home work by law were made in this country during the latter part of the nineteenth century, and today 19 States,³ the District of Columbia, and Puerto Rico have laws or regulations which, to some extent, expressly prohibit or attempt to regulate the performance of industrial work in private homes. In the case of Ohio, however, the regulations apply only when outside workers who are not immediate members of the family living in the home engage in work therein. . . .

For the most part earlier measures have proved ineffective in meeting the frequent abuses and complexities of the home-work practice. Almost without exception, they were aimed at the tenement sweatshop, where family and neighbors gathered to perform work sent in from factories. In a number of instances, they limited the workers to members of the family living in the place where the work was performed, and attempted to protect the consuming public by regulating the sanitary conditions under which such articles as wearing apparel, or accessories, or tobacco products were manufactured. Most of the earlier laws failed to cover

² Report of Department of Labor and Factory Inspection, State of Connecticut, 1934-36, p. 37.

³ California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, West Virginia, Wisconsin, and Puerto Rico.

all kinds of industrial work which is sent into homes and all places where home work is carried on. They failed utterly to meet such abuses as long hours, low wages, the employment of young children, the unfair competition with factory production. Only comparatively recent legislative action, indeed, has attempted to face the home-work practice squarely as a competitive method of industrial production.

Under the National Recovery Administration great gains were made where codes prohibited the giving out of industrial home work, and both before and after the passing of the codes interest in legislation to consolidate and preserve these gains developed.

In 1935 New York passed a new home-work law prohibiting industrial home work in certain specified industries and making further prohibition possible by order of the Industrial Commissioner whenever home work is found to endanger the labor standards for factory workers in the industry or the health and welfare of home workers.

Prior to this date two States, New York and New Jersey, had moved to prohibit by statute industrial home work in a few industries in which obvious health hazards existed, and Oregon, under its general authority to regulate the conditions of employment of women and minors, had by order forbidden employers to send any work in the needlecraft occupations into private homes, insanitary basements or buildings, or places unsafe on account of fire risks.

The passage of the New York law in 1935 was followed by the enactment in Connecticut, also in 1935, and in Rhode Island in 1936 of legislation which likewise looks toward the eventual elimination of the home-work practice in those States. In 1937 home-work legislation was introduced in 10 States. As a result, Connecticut materially strengthened its

recent enactment; and Massachusetts and Pennsylvania passed laws, not only prohibiting home work in certain listed industries, but, like New York, also authorizing their State departments of labor to prohibit home work elsewhere whenever it is found to be detrimental to the home workers themselves or to jeopardize the labor standards in the industry. Illinois outlawed home work in a few specific industries but failed to make further prohibition possible, except as it may be brought about indirectly by requiring employers who wish to give out industrial home work to obtain annual licenses for which substantial, graduated fees, based on the number of home workers, are prescribed. Texas adopted a measure that is similar in form to the new prohibitory enactments, but which places the whole control of the home-work practice upon a health basis and lodges enforcement within the State Board of Health. In addition, bills of the prohibitory type passed one house in New Hampshire, New Jersey, and West Virginia.

Acting under the authority of its 1935 law, New York has recently put into effect its third prohibitory order. The first prohibited home work in men's and boys' outer clothing, including merchant tailoring; the second, in the men's and boys' neckwear industry; and the third, in artificial flowers and feathers. Each of the orders was issued only after investigation by the Department of Labor and a public hearing at which employers, home workers, and other interested parties had an opportunity to be heard. In each instance special provision was made for aged or handicapped home workers. Rhode Island has included a home-work prohibition in each of its two minimum-wage orders applying to the jewelry manufacturing industry and to the manufacture of wearing apparel and allied

products. Oregon, acting under a general authority to control the conditions under which women and minors are employed, has moved to prohibit industrial home work in the needlecraft occupations. California, acting under a similar authority, requires home-work employers in the manufacturing and nut-cracking and sorting industries to secure licenses and to keep records, and forbids their giving out home work to women and minors employed in their regular places of business.

With full realization that the only real solution of the many problems arising from the home-work practice lies in its ultimate abolition, a number of the States in the meantime are taking steps to remove as many of its unfair competitive advantages as possible, hoping in this way to remove a part of the incentive to its continued practice and to hasten its complete elimination. Wisconsin, a State where home work had not become firmly entrenched, has found that the application of minimum-wage rates from the very outset has been effective in preventing the growth of the home-work practice. Rhode Island, Massachusetts, and New York, under its prohibitory orders, require that the home worker be paid at the same rate as the factory worker; and Massachusetts, in addition, has ruled that the minimum wages established by its Minimum Wage Commission apply. Connecticut, which, since the passage of its new law in 1935, has reduced the number of its known home workers from 7,000 to 123 now operating under special certificates, is attempting to enforce a flat 25-cent minimum hourly rate in these special cases.

Many of the new State laws establish a minimum age, frequently 16 years, for home workers, and Wisconsin, in its new child-labor laws of 1938, lists industrial home work as one of the occupations which are prohibited to minors under the

age of 18 years. Massachusetts, by regulation, has provided for hearing and special permission from the Department of Labor and Industries before a home-work certificate is granted to any minor between the statutory minimum age of 14 years and 18 years.

A number of States are applying their workmen's compensation laws, as well as their unemployment compensation laws, to industrial home workers, and New York reports that not infrequently the insurance carriers are refusing to re-insure these workers upon the expiration of the original contract. In New York, the application of workmen's compensation to industrial home work has been upheld in the courts, and recently the New York Unemployment Insurance Appeal Board affirmed the Deputy Commissioner's ruling that employers must contribute to the unemployment insurance fund for industrial home workers on the same basis as in the case of other employees.

Connecticut has found publicity an effective weapon in discouraging the illegal distribution of industrial home work.

Several States limit, by statute, the hours worked by home workers to those established by law for regular manufacturing employees. Massachusetts, in its administrative regulations, requires that the combined hours of home workers, who also work in the factory, be limited to 9 a day and 48 a week in both places. In its minimum-wage orders applying to the manufacturing and nut-cracking and sorting industries, California forbids employers to give home work to women and minors employed in their plants. Other States attempt to control the hours worked by home workers by limiting the amount of work that may be given to them at any one time. Several States require the employer to deliver and call for the work without cost to the home worker.

New Jersey insists that out-of-State employers who wish to send work to New Jersey home workers designate local distributors to represent them, hoping in this way to facilitate the application of the State's home-work regulations.

As significant as is the growing interest in improved home-work legislation and in its effective administration, the individual State law fails completely to solve the problems that arise when industrial home work is distributed across State lines. Each year large quantities of home-work materials are sent by truck, express, through the mails, or through local agents or distributors, to hundreds, if not thousands, of home workers living in other States. New York is the chief source of the industrial home work that crosses State lines, although there is a substantial interchange of materials between New Jersey and Pennsylvania. The home workers who perform this work are widely scattered in a great many States. In view of the widespread agreement that home work as a method of industrial production must go and of the current enactment in a number of States of legislation looking toward its local elimination, this tendency to perpetuate itself by reaching out into other communities is especially significant. Its threat to States having little or no regulation of industrial home work, and to States where home work has been virtually unknown heretofore, is obvious.

No single State law alone can hope to control this feature of industrial home work. For this reason, recent meetings of State labor-law administrators and representatives of organized labor have urged the prompt enactment in all States and by the Federal Congress of legislation that anticipates the abolition of the home-work system. The following reports were adopted at the Second and Fourth National Conferences on Labor Legislation, respectively:

REPORT OF COMMITTEE ON INDUSTRIAL HOME WORK⁴ ADOPTED BY SECOND NATIONAL CONFERENCE ON LABOR LEGISLATION, OCTOBER 4-5, 1935

Evidences are now available that various processes in some 75 or more manufacturing industries are being given out to be done in homes, that such work is carried on in practically every State in the Union, and that the wages paid and the conditions under which the work is done constitute a serious undermining of labor standards, of which the labor authorities in the various States are aware and about which they are greatly concerned.

The committee agrees that the only way to control these growing evils of industrial home work is by its complete abolition.

The committee recommends as the best method of reaching this goal the enactment of State legislation that will control and ultimately abolish the giving out of work to be done in homes.

The committee recommends as essential points to be covered in the legal regulation of industrial home work the following:

1. Every employer, contractor, and distributor giving out home work must obtain annually a license, for which he shall pay such fee as the State requires. He must furnish to the enforcing authority complete and current registers of all home workers.
2. Every home worker should be required to obtain a certificate permitting him or her to do home work.
3. State labor laws such as minimum wage, hours of work, child labor, wage collection, workmen's compensation, and others shall apply to industrial home work.
4. Every employer giving out home work shall be required to keep a record of the wages paid to each worker and the amount of work done by such worker.

In order to prevent undue hardship in the abolition of industrial home work, the committee recommends that such work be limited to persons physically handicapped or those responsible for the care of persons totally disabled.

Since one of the aspects of home work makes State control more difficult—namely, the sending of goods for home-work manufacture across State lines, and since there is evidence that this practice is increasing—the committee recommends that the United States Department of

⁴ Proceedings of the Second National Conference on Labor Legislation, October 4-5, 1935, Bulletin No. 3, Division of Labor Standards, p. 71.

Labor be asked to continue to investigate the extent and nature of the passage of home-work goods in interstate commerce and explore the possibilities of Federal legislation to control this practice.

RESOLUTION ON INDUSTRIAL HOME WORK⁵ ADOPTED BY FOURTH NATIONAL CONFERENCE ON LABOR LEGISLATION OCTOBER 25-27, 1937

Whereas, Industrial home work exploits the workers engaged in the practice, undermines the employment standards in competing factories, jeopardizes the health of the workers and the public, and is a means of evading wage, hour, and child-labor regulations; and

Whereas, A number of States have already enacted legislation which makes the prohibition of industrial home work possible; and

Whereas, Already large quantities of home-work materials are being shipped across State lines, and one result of this prohibitory type of State legislation may be the further spread of industrial home work into States not yet faced with the problem; therefore, be it

Resolved, That the Fourth National Conference go on record in favor of the elimination of industrial home work and urge the rapid enactment of home-work legislation of the prohibitory type by States not already having such laws; and be it further

Resolved, That the United States Congress be urged to enact legislation controlling industrial home work in interstate commerce in the United States, its territories, and possessions, which clearly looks toward the ultimate elimination of the practice.

For more than 2 years a number of States have been reporting to each other cases involving the interstate shipment of industrial home work, and have sent copies of all such reports to the Division of Labor Standards, United States Department of Labor, which has served as a clearing house for information on this subject. This exchange of information has proved very helpful to the States in their efforts to locate and regulate the performance of industrial home work.

On June 25, 1938, the Fair Labor Standards Act became law. This act pro-

vides for minimum wages and regulates the hours of employment in industries engaged in interstate commerce or in the production of goods for interstate commerce. It also includes provisions affecting the employment of children. While containing no express reference to industrial home work, the law makes no exception for this method of manufacture, and the Administrator of the Wage and Hour Division, United States Department of Labor, has stated in Interpretative Bulletin No. 1, "since the Act contains no prescription as to the place where the employee must work, it is evident that employees otherwise coming within the terms of the Act, are entitled to its benefits whether they perform their work at home, in the factory, or elsewhere." Special regulations applying to the keeping of records with respect to industrial home work have been issued.

Following the Second National Conference on Labor Legislation at Asheville, N. C., in 1935, the Secretary of Labor asked a committee of State labor-law administrators to prepare a bill that might be of use to States contemplating revision of existing home-work laws or the introduction of new legislation. This bill, which was subsequently endorsed by the Third National Conference on Labor Legislation and by the International Association of Governmental Labor Officials, has been the basis for much of the home-work legislation that has been introduced during the last 2 years. The bill makes the original employer who initiates the home-work process and for whom the work is really done responsible for the conditions under which the work is performed. It requires every employer who sends work into homes to secure from the State department of labor a permit that may be revoked whenever the conditions of manufacture are found to be in violation of certain set

⁵ Proceedings of the Fourth National Conference on Labor Legislation, October 25-27, 1937, Bulletin No. 18, Division of Labor Standards, p. 122.

standards. A graduated fee for this permit is provided.

If the employer lives in one State and the home worker in another, the local contractor distributing the work is held responsible as though he himself were the employer. The bill completely prohibits home work on certain commodities and empowers the State labor commissioner after investigation and public hearing to prohibit home work in any industry in which it is found to be injurious to the health and welfare of the home workers themselves or to jeopardize factory standards. In a further effort to equalize the competitive advantages of the home-work employer, a graduated tax, based upon the number of home workers employed, is provided. . . .

Following the recommendations of the Third National Conference on Labor Legislation, the First Conference of State Industrial Home-Work Law Ad-

ministrators met in Washington on June 16, 1937, at the invitation of the Secretary of Labor, to exchange experience and plans for the enforcement of home-work legislation, with especial reference to the more recent prohibitory type of law. This meeting represented the first occasion when those who are actually engaged in enforcing State home-work laws had come together for the purpose of discussing mutual problems of enforcement and effective methods of administration. A second meeting of the Conference was held on February 11, 1938. Subsequent meetings will be held from time to time. The conference provides opportunity for continued exchange of experience arising in the enforcement of the home-work laws, and has been found particularly helpful during this early period when experience under the new type of legislation is limited and the matter of effective administrative techniques is still in a formative period. . . .

CHAPTER TEN

WORKMEN'S COMPENSATION

In the earlier chapters we have dealt primarily with the regulation of those aspects of the labor contract which affected workers while they were employed; e. g., wages and hours. Another very important part of labor legislation is concerned with what happens to workers when they are forced to stop working, temporarily or permanently. Of the numerous social and economic effects of industrial accidents, occupational disease, unemployment, and old age, none is so impor-

tant as the loss of income. When work stops, income also stops, and only in exceptional cases can the worker fall back upon savings sufficiently large to offset the loss of income. Governmental action intended to protect the worker from the complete loss of income, has included laws dealing with accidents and disease, unemployment, and old age. First to receive attention from legislatures was the matter of industrial accidents.

I. INDUSTRIAL ACCIDENTS

Accidents would seem to be inherent in the nature of modern industry. While some effort has been made to develop a tri-partite explanation for industrial accidents which would ascribe some to the fault of the employer, some to the employee, and some to the nature of the industry, it is becoming increasingly evident that by far the largest number of accidents are attributable to the nature of the industry alone. Whether it be the speed-up methods used in production, the great demands on the physical energies of the worker, or the manufacture of commodities like steel in which the likelihood of injuries is very great, industry takes a huge annual toll in industrial countries. It is estimated that from 25,000 to 35,000 workers are killed each year while on the job, and that there occur about 2,000,000 non-fatal accidents, some of which cause a very short layoff from work while others result in permanent and total incapacity. Nor would the number of accidents seem to be diminishing with the passage of time; on the contrary, as the late E. H. Downey pointed out, modern industry is making greater and greater demands on the worker so that we can not look forward to any decrease in the number of accidents, if indeed we can stave off a positive increase.

In considering this problem, it is well to

note the effects of accidents other than the purely physical harm they do to the injured person. From a purely social standpoint, they result in a reduction of the productive power of the nation in that a worker, injured or killed, is to that extent incapable of contributing to the sum total of the national product. From the standpoint of the worker and his family, injuries mean a stoppage of the income of the family which all too frequently finds itself without adequate reserves to carry it over the period when the worker shall have resumed work. This in turn means that the burden of support is thrown on others—immediately, perhaps, on the mother and the children. As Crystal Eastman points out in her *Work Accidents and the Law*, one of the explanations for women and children in industry is the loss of income caused by accident to the chief breadwinner. There is also a very common lowering of the standard of living necessitated by reduced income. Or an accident may mean that the burden of support is thrown on relatives or on society whether through public or private charitable organizations. All these effects have been recognized by students of the problem and they have been powerful factors in securing action by the state and its agencies.

II. THE COMMON LAW AND INDUSTRIAL ACCIDENTS

Three distinct phases may be discerned in the relation of government to the question: the common law of master and servant, employers' liability laws, and workmen's compensation laws. Not all the states of the United States have passed through these stages—one state has not yet passed a workmen's compensation law, and certain large groups of workers (for example, railroad employees engaged in interstate transportation) have not been brought under compensation laws. But the development has been so nearly the same in all states that we are justified in regarding the above phases as typical.

When the number of industrial accidents first became important, workers in increasing numbers, having no other remedy to compensate themselves for loss of income, began to sue their employers for damages. The courts did not have any statutes to guide them in their decisions; nor were there judicial precedents on the subject. They were forced, therefore, to find legal justification for their decisions in *analogies* in other branches of the common law, conspicuously the common law of torts. From the middle of the nineteenth century to the passage of employers' liability laws (many of which came after the beginning of the twentieth century), judges decided cases involving industrial accidents on the basis of precedents having their foundations in the *common law*.

What the common law did, for the most part, was to apply to industrial accident cases the ordinary rules of negligence. Now the common-law rule of negligence is that there is no liability without fault; that is, a plaintiff cannot recover damages from a defendant unless he can prove that the latter had been negligent in his duty. Thus, before the worker received a verdict, he had to prove to the satisfaction of a judge and a jury that his employer had been negligent in the performance of his duty.

The Employer's Duty

But what is the master's duty to his servant? And what constitutes negligence? Under the common law, the master owed his servant certain duties, and his failure to perform these duties gave to the injured em-

ployee a cause of action. The employer was obliged to provide his servants with a safe place to work; he had to equip them with safe tools and appliances; he had to furnish them with sufficient and competent co-workers or fellow servants; he was bound to promulgate suitable and reasonable rules for carrying on the work; and he was further obliged to warn and instruct young and inexperienced employees of the danger of the work.

These were positive duties which the master could not delegate to others in the hope of escaping liability thereby, and failure to perform these duties created a presumption of negligence on the part of the employer. To recover damages, the worker had to show that his employer had been remiss in his duty; that he had, for example, failed to provide a safe place to work. But what is a safe place to work? What are safe tools and appliances? Sufficient and competent fellow servants?

To answer this question, judges invented an hypothetical average person, somewhat akin to the economic man, who served as a standard of comparison. This hypothetical person was presumed to be a normal, reasonable person and if the employer acted in the way this person was supposed to act he could not be charged with negligence. Did the worker charge that he had been given unsafe tools which resulted in his being hurt? The question then was, had the employer exercised reasonable precautions (as would have been exercised by the hypothetical person) to secure safe tools? If he had, the worker could not recover. Or, suppose a worker had been hurt as the result of the action of an incompetent fellow servant. If the employer knew that the servant was incompetent or if he might have known of it by the exercise of "reasonable" care, he was liable to the worker. Otherwise, he was not. So that if a worker had been hurt by reason of a hidden defect in a tool which defect could not have been discovered by a "reasonably" careful inspection, he could not recover from his employer, for his employer had not been negligent. The rule may now be restated as follows: under the common law, if the master had been as

diligent in securing safe tools and appliances, a safe place to work, competent fellow servants, etc., as an hypothetical normal person would have been, the master was relieved of fault (and hence of liability for damages) even though the fellow servants were in fact

incompetent, the place of work unsafe, and the tools and appliances dangerous.

The common-law attitude toward the employer's duties in respect of his employees is will illustrated in the case of *Baltimore & Ohio Railroad Company v. Baugh*.

BALTIMORE & OHIO RAILROAD COMPANY *v.* BAUGH

Supreme Court of the United States. 1893.

149 U. S. 368; 13 Sup. Ct. 914; 37 L. Ed. 772.

MR. JUSTICE BREWER delivered the opinion of the court.

... There must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet, if we analyze these matters a little, there will appear less difficulty in the question. Obviously, a breach of positive duty is personal neglect; and the question in any case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employé with fit and careful co-workers, and the employé has a right to rely upon his discharge of this duty. If the master is careless in the matter of employing a servant, it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person the fact that he has an incompetent, and, therefore, an improper employé is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to a co-servant, is it not obvious that the master's omission of duty enters directly

and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his service, and as the result of such reasonable inquiry is satisfied that the employé is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty; and this, notwithstanding that after the servant has been employed it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to enter into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain agencies will or will not do a negligent act. So it is not possible for the master, take whatsoever pains he may, to secure employés who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken, notwithstanding the reasonable precautions he has taken. Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow-servant, does not of itself prove any omission of care on the part of the master in his employment; and it is

only when there is such omission of care, that the master can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him responsibility for such employé's negligence.

Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence

in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged, when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution. . . .

In a suit for damages because of an industrial accident, the injured worker had, then, to prove that his employer had not acted reasonably in the performance of the duty to provide a safe place to work, safe tools, etc. This quite obviously "stacked the cards" in the employer's favor, partly because of the difficulty of giving satisfactory proof (fellow employees would not be likely to give evidence against their employer, for fear of losing their jobs) and partly because so many accidents were caused by other factors than the employer's negligence.

This was not, however, the full extent of the worker's handicap. Even if the employer had been guilty of negligence, he might still escape liability if the injury was wholly or in part caused by the negligence of the injured worker himself. This rule, commonly known as the doctrine of *contributory negligence*, is not peculiar to the law of industrial accidents. It is based on the theory that where one has contributed to an accident, which might otherwise not have occurred, one is not entitled to damages even though some other person was negligent. The application of the doctrine to labor law is illustrated in the case of *Swasey v. Maine Central Railroad Company*.

SWASEY v. MAINE CENTRAL RAILROAD COMPANY

Supreme Court of Maine. 1916.
115 Me. 215; 98 Atl. 706.

In this case, dealing with contributory negligence, the first of the chief common-law defenses of the employer against damage suits by injured workmen, a brakeman had neglected to re-couple cars by means of the automatic couplers, but attempted to couple the cars with his hands. While so doing, his foot was caught in a guard rail, and he was run over and injured.

The plaintiff was an experienced railroad man. He knew of the danger of going between moving cars. He knew that the cars were equipped with automatic couplers, that the couplers were in working order, and that he could couple and uncouple the cars by the use of the automatic coupler without going between them. There was no necessity or stress of circumstances that compelled him, or made it his duty to go between the cars. He knew that, if he used the coupler in the manner that it was intended to be used, he could couple and uncouple the cars in safety, and, instead of employing the safe method of doing the work, he saw fit to step into a dangerous position between moving cars, and by the use of his hand to compel the coupler to work in a different manner than it was intended to work.

Where the master has provided a safe method for the servant to perform the work assigned to him, and the servant

knows it, and, instead of using the safe method provided, uses an unsafe method without directions to do so from his employer, he does so at his own risk, and is guilty of contributory negligence if injured while performing the labor. . . . There are many federal cases which hold that the conduct of the plaintiff in this case was negligence, and if it contributed to his injury that he cannot recover.

A second defense available to the employer under the common law was that the injury had resulted from the negligence of a fellow worker. This doctrine that an employer is not liable to one of his employees for an injury caused by the negligence of a co-worker is indigenous to labor law. It was first enunciated in an English case, *Priestley v. Fowler* (3 Mees. & Welsb. 1) in 1837, and was soon followed by American courts. By the application of the fellow-servant doctrine (sometimes referred to as the doctrine of common employment), the worker was placed in a position different from that of an outsider who was injured. As far as outsiders were concerned, the employer was liable for the negligence of his employees. The justification for the departure from this rule of *respondet superior* (the responsibility of the employer for the torts of his employees) and the establishment of a separate rule for injury caused by a fellow servant is well stated in this case which, though not the earliest, is the leading American case on the subject.

FARWELL v. THE BOSTON AND WORCESTER RAIL ROAD CORPORATION

Supreme Judicial Court of Massachusetts. 1842.
4 Metcalf (45 Mass.) 49.

SHAW, C. J. This is an action of new impression in our courts and involves a principle of great importance. It presents

a case, where two persons are in the service and employment of one company, whose business it is to construct and main-

tain a rail road, and to employ their trains of cars to carry persons and merchandize for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. . . .

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. . . . This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondet superior* is adopted in that case, from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an in-

jury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated. . . .

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. . . .

If we look from considerations of justice to those of policy, they will strongly

lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned under given circumstances. . . .

. . . Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty caused by the negligence of another servant of the company. Under these circumstances, the loss must be

deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, upon which it would be extremely difficult to establish a practical rule. Where the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a rope walk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The

master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connexion with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant. . . .

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine: Whether this would depend upon an implied war-

ranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company—are questions of which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper rail road track, a well constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

The third common law defense available to an employer sued for damages by an injured employee was that the latter had *assumed the risks* of the employment so that he had to bear the loss caused by the injury. The worker was presumed to be aware of the hazards of his job when he began work and the courts read into the contract of employment an agreement by the worker that he consented to the risks, thus precluding recovery of damages. A theoretical justification

for this was founded on the supposition that work in hazardous employments was higher paid than in nonhazardous employments, the extra pay being a compensation for the risks undertaken. No particular effort was made by courts to discover whether this was actually so or not; they assumed it was so and acted upon it.

If, then, a worker in a steel mill was injured through some agency of which he was aware (for example, falling from a great height, being struck by falling objects, being burned, etc.), or of which he might have known by the exercise of "reasonable" care, the employer was not liable.

More than this! If the employer had been negligent (for instance, if he had provided unsafe tools and equipment) and the worker was aware of the negligence and continued working, he was held by the courts to have assumed the additional risks of the unsafe tools and equipment so that he could not recover for an injury caused by these tools. Suppose a machine to have fallen into such a state of disrepair as to endanger the safety of the

worker. It was then the worker's duty to report the matter to the employer and to refuse to continue work unless the employer promised to remedy the defect. Or suppose the worker discovered his fellow worker to be a drunkard and hence a menace to safety. It was his duty to report the matter to the employer; if he said nothing, or got no assurances that the incompetent worker would be removed, but continued to work and was injured as a result of the other's incompetence, he could not then claim that the employer had been negligent in hiring the fellow servant.

From many points of view, the defense of assumption of risk was one of the most powerful hindrances in the way of the worker who sought to collect damages from his employer, for as time went on most courts became more and more willing to read additional assumptions of risk into the contract of employment.

A recent illustration of the doctrine of assumption of risk is to be found in *Missouri Pacific v. David*.

MISSOURI PACIFIC RAILROAD COMPANY *v.* DAVID

Supreme Court of the United States. 1932.
284 U. S. 460; 52 Sup. Ct. 242; 76 L. Ed. 399.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

While employed by petitioner railroad company and charged with the duty of protecting its trains against robbers, James Lee David was murdered in the night of May 17, 1923. His administratrix sued for damages under the Federal Employers' Liability Act . . . in the circuit court, Jackson county, Mo., and obtained a favorable verdict. Judgment thereon was affirmed by the Supreme Court. 41 S. W. (2d) 179. The cause is here upon writ of certiorari. . . .

Often during the months prior to April, 1923, the petitioner suffered losses through depredations by organized bands of robbers upon freight trains in and near Kansas City, Mo. It determined to make special efforts to frustrate further attacks by

the culprits, and, if possible, cause their apprehension. To this end, on April 1, 1923, it employed David to act as a "train rider" or guard for its cars. He had had experience in similar undertakings. Also he was carefully advised concerning the probable danger. He was told that the robbers were desperate men who "would shoot him just as quick as they saw him." He carried a pistol and sawed-off shotgun "for the purpose of defending himself and the company's property." When asked "Whether you will fight these fellows or not?" he replied, "I will fight them until I die."

Subsequent to David's employment, in order to strengthen its efforts towards frustration and to secure arrests, petitioner employed McCarthy, known to be associated with one of the criminal bands,

who agreed, when possible, to furnish advance information of intended depredations, aid in locating stolen goods, etc. "His instructions were that he was to get us word before the robbery was committed . . . if he could, if not, to give us information as soon as he could after the robbery had been committed."

The theory upon which respondent recovered below is that, while acting for petitioner, McCarthy knew of a plan to rob the train to which David was assigned on May 17th, and in violation of his duty negligently failed to notify his superior officers; that because of such negligence David received no notice of the plan, although he had the right to rely upon being supplied with such information in order to prepare to cope with the brigands on equal terms. As a consequence, he failed to take the necessary precautions, and exposed himself to being shot.

The established rule is that in proceedings under the Federal Employers' Liability Act . . . assumption of the risk is an adequate defense. . . .

Under the circumstances disclosed by

the record, clearly we think David assumed the risk of the default which, it is said, resulted in his death. He understood the nature of his employment and the incident dangers. He well knew that he was subjecting himself to murderous attacks by desperadoes. There was no promise to give him special warning or protection. Even if he had knowledge of McCarthy's employment (and this is far from certain), he must have appreciated the utter unreliability of the man and the probable inability of the master to obtain timely information through such a medium. He could not properly expect to be protected against criminals whom he was employed to fight through treachery by one of their associates. The common employer, notwithstanding efforts to obtain warning, actually knew nothing of the criminal plan. If we accept respondent's view of the facts, David assumed the risk of the negligent action of which complaint is now made.

We need not consider any other point advanced in behalf of the petitioner. . . .

III. EMPLOYERS' LIABILITY LAWS

To appreciate the position of the injured worker under the common-law rules, at least until late in the nineteenth century, it is necessary to remember that the courts were strongly inclined to extend every possible measure of protection to business. In deciding work-accident cases, the courts used every legal artifice at their command to keep the burden of the accident where it first fell—on the injured worker. For this was an era in which the theory of *laissez-faire* predominated and legislatures and courts were extremely zealous in their protection of private property against invasion. Steeped in a philosophy which held the protection of private property as an ideal, judges were inclined to interpret the law in a manner which lessened the chances of the injured worker to recover damages. They read into the contract of employment the doctrine of assumption of risk;

in addition, they invented the fellow-servant doctrine. Following this, both these doctrines as well as that of contributory negligence were interpreted and reinterpreted; analogies were drawn and "logical next steps" taken. The result was that the defenses available to the employer, e. g., the fellow-servant doctrine, were extended far beyond their original meaning and made to apply to situations amazingly different from those under which they were first originated. For example, the first use of the fellow-servant doctrine by the courts, in the *Priestley v. Fowler* case, involved a driver and a helper on the same wagon. The court ruled there that the nature of the work-relationship was such that the helper was in a better position to be informed of the driver's negligence than the employer. From this relatively simple beginning the doctrine was expanded so that those

working for the same employer were treated as fellow servants though they were in different departments and did not know of each other's existence. Then, too, supervisory employees, like foremen, under whose orders the worker was expected to perform his duty, were often called fellow servants, so that if a worker was injured through obeying his superior's orders, the latter's negligence was no basis for recovery by the employee.

The very harshness of the common law, however, led to a change. As the nineteenth century advanced, more and more attention was directed to the effects of the common law rules. It became evident that few workers succeeded in securing a verdict for damages; also, that the system was very wasteful in that it involved constant recourse to the courts with the consequent piling-up of attorneys' fees and court costs. Since few workers could afford to retain lawyers on a fee basis, the practice developed of hiring a lawyer on a contingent fee basis, the lawyer getting perhaps 50 per cent of the award. Other criticisms of the common law dealt with the slowness of the process; even if a big verdict was obtained, it usually came years after the accident so that the injured worker and his family did not benefit at the time they most needed help. It was also asserted that litigation bred a very undesirable antagonism between employer and employee. In addition, there were complaints concerning the uncertainty: uncertainty as to the basis of the claim for damages under the common law, as to the amount of damages which might be awarded, and as to the collection of a judgment after it had been obtained and sustained.

Some of the rigors of the common-law system were modified by "liberal" judges. Thus, some courts began to differentiate between cases where the negligent fellow worker was in the same department as the injured person and those in which he was far removed. In a number of instances, courts held that supervisory employees were not fellow servants. Further, in the case of corporations, there was a definite tendency to hold that the negligence of the officers was the negligence of the corporation, for which it was responsible.

A much more important breach in the common law system was made by the various

employers' liability laws which were enacted both by the states and by the federal government. These laws modified the common law in a variety of ways. For instance, beginning with a Georgia statute of 1856, many laws modified, or abolished altogether, the fellow-servant doctrine. In a number of states, contributory negligence was to result in a reduction in the amount of damages payable to the worker, but not to the elimination of damages altogether: i. e., by introducing the concept of *comparative negligence*, the law provided that the injured man was to be penalized in proportion to his responsibility for the injury. Other provisions of employers' liability laws prevented the employer from pleading "assumption of risk" in cases where he was guilty of violating a law relating to safety of tools, working place, etc. In addition, employers' liability laws might provide for shifting the burden of proof from the worker to the employer.

The constitutionality of state employers' liability laws was upheld in numerous decisions. For example, in *Missouri Pacific Railway Company v. Mackey*,¹ the United States Supreme Court, through Justice Field, upheld a Kansas law abrogating the fellow servant doctrine as far as railroads were concerned.

The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the Fourteenth Amendment. The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employes, though it may be by the negligence or incompetency of a fellow-servant

¹ 127 U. S. 205; 8 Sup. Ct. 1161; 32 L. Ed. 107 (1888).—E.S.

in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt.²

See also the *Arizona* decision, reported just below.

² For other decisions upholding employers' liability laws, see *Minneapolis and St. Louis Ry. Co. v. Herrick*, 127 U. S. 210 (1888); *Tullis v. Lake Erie and Western Railroad Co.*, 175 U. S. 348 (1899); *Minnesota Iron Co. v. Kline*, 199 U. S. 593 (1905). See also references in *New York Central Railroad Company v. White*, 243 U. S. 188 (1917).—E.S.

ARIZONA EMPLOYERS' LIABILITY CASES

Supreme Court of the United States. 1919.
250 U. S. 400; 39 Sup. Ct. 553; 63 L. Ed. 1058.

In 1912, Arizona passed an unusual employers' liability law which provided that, in all hazardous occupations, employers were to be liable to their employees for all injuries, other than those caused by the negligence of the injured men themselves. Not merely did this statute cut off the defenses of assumption of risk and fellow servant, but it made the employer liable even if he was not negligent, thus altering the common law rule that there could be no liability without fault. Along with the liability law, Arizona passed a compensation law for workers in "especially hazardous" industries. The Supreme Court's decision on the constitutionality of this law came in 1919, two years after the constitutionality of workmen's compensation laws had been affirmed (see below, *New York Central v. White*, *Mountain Timber Co. v. Washington*, and *Hawkins v. Bleakly*); undoubtedly, the decision in the compensation cases paved the way for the positive language used in the later case—it is interesting to speculate as to the attitude of the Supreme Court if this law had come before it in 1912 or 1913.

* * *

MR. JUSTICE PITNEY delivered the opinion of the Court. . . .

The principal contention is that the Arizona Employers' Liability Law deprives the employer of property without due process of law, and denies to him the equal protection of the laws, because it imposes a liability without fault, and, as

The right of Congress to pass an employers' liability law covering railroad workers engaged in interstate commerce was upheld in *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169 (1912). In the first *Employers' Liability Cases*, 207 U. S. 463; 28 Sup. Ct. 141; 52 L. Ed. 297 (1908), the federal act had been declared unconstitutional because it applied to those engaged in intrastate as well as those engaged in interstate commerce.

is said, without equivalent protection. The statute, in respect of certain specified employments designated as inherently hazardous and dangerous to workmen—and reasonably so described—imposes upon the employer, without regard to the question of his fault or that of any person for whose conduct he is responsible, a liability in compensatory damages—excluding all such as are speculative or punitive—for accidental personal injury or death of an employee arising out of and in the course of the employment and due to a condition or conditions of the occupation, in cases where such injury or death of the employee shall not have been caused by his own negligence. . . .

In effect, the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee attributable to hazards inherent in the employment and due to its conditions and not to the negligence of the employee killed or injured. In determining whether this departure from the previous rule is so arbitrary or inconsistent with the fundamental rights of the employer as to render the law repugnant to the Fourteenth Amendment, it is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by

the common law, with occasional statutory modifications. The rule existing in the absence of statute, as usually enunciated, is that all consequences of risks inherent in the occupation and normally incident to it are assumed by the employee and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations, requiring the employer to assume the risk under certain circumstances, the employee under other. . . .

But these are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization, in view of the relations existing between employer and employee *in the absence of legislation*. They are not placed, by the Fourteenth Amendment, beyond the reach of the State's power to alter them as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in defiance of natural justice, with the right of employers and employees to agree between themselves respecting the terms and conditions of employment.

We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employee attributable to accidents

arising in the course of the employment and due to its inherent conditions, exceeds the bounds of permissible legislation or interferes with the constitutional rights of the employer. The answer that the common law makes to the hardship of requiring the employee to assume all consequences, both personal and pecuniary, of injuries arising out of the ordinary dangers of the occupation is that the parties enter into the contract of employment with these risks in view, and that the consequences ought to be, and presumably are, taken into consideration in fixing the rate of wages. In like manner the employer, if required—as he is by this statute in some occupations—to assume the pecuniary loss arising from such injury to the employee, may take this into consideration in fixing the rate of wages; besides which he has an opportunity, which the employee has not, to charge the loss as a part of the cost of the product to the industry.

There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. But, as we have seen, the statute limits the recovery strictly to compensatory damages. And there is no discrimination between employer and employee except such as necessarily arises from their different relations to the common undertaking. Both are essential to it, the one to furnish capital, organization, and guidance, the other to perform the manual work; both foresee that the occupation is of such a nature, and its conditions such, that sooner or later some of the workmen will be physically injured or maimed, occasionally one killed, without particular fault on anybody's part. The statute requires that compensation shall be paid *to* the injured workman or his dependents, because it is upon them that the first brunt of the loss falls; and that it shall be paid *by* the employer, because he takes the gross receipts of the common enterprise, and by reason of his position of

control can make such adjustments as ought to be and practically can be made, in the way of reducing wages and increasing the selling price of the product, in order to allow for the statutory liability. There could be no more rational basis for a discrimination; and it is clear that in this there is no denial of the 'equal protection of the laws.'

Under the 'due process' clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured, but where nobody knows or can know in advance which particular men or how many will be the victims, or how serious will be the injuries, and hence no adequate compensation can be included in the wages; and to employ them thus with the legitimate object of making a profit above their wages if all goes well, but with immunity from particular loss if things go badly with the workmen through no fault of their own, and they suffer physical injury or death in the course of their employment. In

view of the subject-matter, and of the public interest involved, we cannot assent to the proposition that the rights of life, liberty, and property guaranteed by the Fourteenth Amendment prevent the States from modifying that rule of the common law which requires or permits the workingman to take the chances in such a lottery.

The act . . . adds no new burden of cost to industry, although it does bring to light a burden that previously existed but perhaps was unrecognized, by requiring that its costs be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the actual and proximate damage sustained by the workman or those near to him, by the employer —by him who organizes the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs, and takes for his reward the net profits, if any. . . .

IV. WORKMEN'S COMPENSATION AND ITS CONSTITUTIONALITY

What the employers' liability laws did was greatly to increase the chances of the worker to recover damages, but they did not strike at the fundamental evils attributed to the common-law system. Accidents caused by the negligence of the worker, accidents caused by factors inherent in the industry regardless of the care exercised by employer and employee, still went uncompensated; further, the litigation, the delays, and the uncertainties remained. It was to remedy these defects that those interested in reform urged the complete abandonment of the system and the adoption, following the example of Great Britain, Germany, and many other European countries, of workmen's compensation plans.

Workmen's compensation laws were founded upon a totally different conception

of law from employers' liability laws. Under the latter, as under the common law, there could be no liability for damages without fault (negligence); under the former, the injured worker and his family received compensation regardless of fault. Thus, even if the accident had been caused by the negligence of the injured person, he could still recover compensation if he had not been willfully and grossly negligent; similarly, compensation was paid where the injury was caused by the inherent nature of the industry. A second important distinction between the two kinds of laws was that under employers' liability laws the injured worker, if victorious in a lawsuit, recovered damages; under the compensation laws, he was awarded sums of money which were meant to be compensa-

tion for lost income, not damages. Third, the constant litigation involved in the older system was at least partly done away with under the compensation laws.

The usual procedure in the early compensation statutes was to designate certain occupations as hazardous and then to provide that the employer was liable for compensation, the amounts and the duration of the payments being specified in the law. Not all classes of workers were included: certain large groups like domestic servants, agricultural workers, employees in small shops and factories, etc., were usually not covered by the compensation laws. In almost all cases, some scheme of insurance was set forth in the law: some provided for compulsory insurance either in an exclusive state fund or in a commercial company, others permitted mutual insurance by employers, still others allowed employers

to insure their own risks. The employer was usually permitted to select his own medium for insurance.

With the exception of some early statutes in Maryland and Montana which were without significance, the first compensation law was that of New York in 1910 which was the result of the report of the Wainwright Commission. This law provided that eight classes of labor were to be grouped as hazardous and that in such cases compensation for injuries, regardless of cause (except serious and willful misconduct by the injured workman), was to be paid by the employer after a two-weeks waiting period. Medical benefits were also provided for.

It was not long, however, before this law was declared unconstitutional by the New York Court of Appeals in the case of *Ives v. South Buffalo Ry. Co.*

IVES *v.* THE SOUTH BUFFALO RAILWAY COMPANY

Court of Appeals of the State of New York. 1911.

201 N. Y. 271; 94 N. E. 431.

WERNER, J. . . . The statute, judged by our common-law standards, is plainly revolutionary. Its central and controlling feature is . . . that the employer is responsible to the employee for every accident in the course of the employment, whether the employer is at fault or not, and whether the employee is at fault or not, except when the fault of the employee is so grave as to constitute serious and willful misconduct on his part. The radical character of this legislation is at once revealed by contrasting it with the rule of the common law, under which the employer is liable for injuries to his employee only when the employer is guilty of some act or acts of negligence which caused the occurrence out of which the injuries arise, and then only when the employee is shown to be free from any negligence which contributes to the occurrence. . . .

This legislation is challenged as void under the fourteenth amendment to the Federal Constitution and under section 6,

article 1 of our State Constitution, which guarantee all persons against deprivation of life, liberty or property without due process of law. . . . The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. Law as used in this sense means the basic law and not the very act of legislation which deprives the citizen of his rights, privileges or property. Any other view would lead to the absurdity that the Constitutions protect only those rights which the legislatures do not take away. If such economic and sociologic arguments as are

here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the Constitution are a mere waste of words. . . . If the argument in support of this statute is sound we do not see why it cannot logically be carried much further. Poverty and misfortune from every cause are detrimental to the state. It would probably conduce to the welfare of all concerned if there could be a more equal distribution of wealth. Many persons have much more property than they can use to advantage and many more find it impossible to get the means for a comfortable existence. If the legislature can say to an employer, 'you must compensate your employee for an injury not caused by you or by your fault,' why can it not go further and say to the man of wealth, 'you have more property than you need and your neighbor is so poor that he can barely subsist; in the interest of natural justice you must divide with your neighbor so that he and his dependents shall not become a charge upon the State?' The argument that the risk to an employee should be borne by the employer because it is inherent in the employment, may be economically sound, but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employee, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer, who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation

of ills primarily due to his business. In its final and simple analysis that is taking the property of A and giving it to B, and that cannot be done under our Constitutions. . . .

We conclude, therefore, that in its basic and vital features the right given to the employee by this statute, does not preserve to the employer the 'due process' of law guaranteed by the Constitutions, for it authorizes the taking of the employer's property without his consent and without his fault. . . .

If we are warranted in concluding that the new statute violates private right by taking the property of one and giving it to another, that is really the end of this case. But the auspices under which this legislation was enacted, no less than its intrinsic importance, entitle its advocates to the fullest consideration of every argument in its support, and we, therefore, take up the discussion of the police power under which this law is sought to be justified. The police power is, of course, one of the necessary attributes of civilized government. . . . But it is a power which is always subject to the Constitution, for in a constitutional government limitation is the abiding principle, exhibited in its highest form in the Constitution as the deliberative judgment of the people, which moderates every claim of rights and controls every use of power. . . . Concrete illustrations of what may and what may not be done under the police power are to be found in this very Labor Law of which the new statute is a part. As this statute stood before article 14-a [workmen's compensation] was added, it regulated electric work, the operation of elevators, work on scaffolds, work with explosives and compressed air, the construction of tunnels and railroad work. It regulated the hours of work in certain employments; it directed the payment of wages in cash at specified periods; it provided for the protection of employees engaged in the erection of buildings; it

compelled the employer to guard dangerous and exposed machinery and to construct fire escapes and ventilating appliances; it required him to provide toilet facilities, pure drinking water and sanitary arrangements. . . . Broadly classified, all these and similar statutory provisions which are designed, in one way or another, to conserve the health, safety or morals of the employees and to increase the duties and responsibilities of the employer, are rules of conduct which properly fall within the sphere of the police power. . . . But the new addition to the Labor Law is of quite a different character. It does nothing to conserve the health, safety or morals of the employees, and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business. Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault, and solely through the fault of the employee, except where the latter fault is such as to constitute serious and willful misconduct. Under this law, the most thoughtful and careful employer, who has neglected no duty, and whose workshop is equipped with every possible appliance that may make for the safety, health and morals of his employees, is liable in damages to any employee who happens to sustain injury through an accident which no human being can foresee or prevent, or which, if preventable at all, can only be prevented by the reasonable care of the employee himself. . . .

. . . In our view of the Constitution of

our state, the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void.

In the same year in which the *Ives* case was decided, the highest courts of other states decided that workmen's compensation laws were not unconstitutional. The Supreme Judicial Court of Massachusetts, in *Opinion of the Justices*, 209 Mass. 607, 94 N. E. 848 (1911), differentiating the proposed Massachusetts law from the New York law, held that the "voluntary" nature of the Massachusetts bill was constitutional, though it indicated that if it had been compulsory (like the New York law) it would have been unconstitutional. The Supreme Court of Washington, on the other hand, in the *Clausen* case, 65 Wash. 156, 117 Pac. 1101 (1911), expressed a philosophy which stands in sharp contrast to that of the New York Court of Appeals. While the *Ives* decision did not interrupt the passage and approval of workmen's compensation laws, it did influence states to pass elective rather than compulsory laws. Under elective laws, both employers and employees had a choice as to whether to be included in the compensation program. The choice was scarcely real, since an employer who rejected workmen's compensation coverage was deprived of the common-law defenses, leaving him vulnerable to damage suits by injured workers. It was nevertheless felt, as in the case of Massachusetts, that regardless of how tenuous the employer's freedom of choice was, courts were more likely to uphold such a law than a compulsory law.

NEW YORK CENTRAL RAILROAD COMPANY v. WHITE

Supreme Court of the United States. 1917.
243 U. S. 188; 37 Sup. Ct. 247; 61 L. Ed. 667.

What the attitude of the United States Supreme Court would be toward workmen's compensation laws was forecast in the decision in *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 35 Sup. Ct. 167 (1915). Here the court held constitutional an Ohio law which de-

prived employers of five or more who did not elect to be covered by the compensation law of the common-law defenses, even though these defenses remained available to employers of less than five.

In 1917, the Supreme Court handed down

three decisions involving the constitutionality of workmen's compensation laws. Of these, the most important was *New York Central Railroad Company v. White*, in which the Court dealt squarely with the right of a state to pass such a law. Following the *Ives* decision, an amendment had been passed to the constitution of the State of New York authorizing the legislature to enact a workmen's compensation law. Such a law was passed in 1913 and re-enacted in 1914.

MR. JUSTICE PITNEY delivered the opinion of the court. . . .

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged . . . are: (a) that the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized

and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees. . . .

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. . . . The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. . . .

The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim *respondent superior*. In the latter case the

employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the *alter ego* while acting within the scope of his duties be negligent—in disobedience, it may be, of the employer's positive and specific command—the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation. . . .

[Justice Pitney then discussed the development of the common-law defenses and the attempts of the states and the national government to alter these rights by means of employers' liability laws.]

We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's willful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation.

Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and ordinarily nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and of necessity bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power; a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power in-

curred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the inn-keeper, of him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. . . . The provision for compulsory compensation, in the act under consideration, cannot be deemed . . . to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in

it as co-adventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that in modern industry the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence. . . .

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract . . . we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. . . .

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the

conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of

vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. . . .

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment. . . .¹

¹ See also *Hawkins v. Bleakly*, 243 U. S. 210, 37 Sup. Ct. 255 (1917).

MOUNTAIN TIMBER COMPANY v. WASHINGTON

Supreme Court of the United States. 1917.
243 U. S. 219; 37 Sup. Ct. 260; 61 L. Ed. 685.

This case involved the constitutionality of the compensation law of the State of Washington which provided that employers were to make payments into a state fund which was to be used to compensate injured workers. By this law, an employer would have to make payments even though none of his workers was injured. Because of this feature, the law was challenged as a deprivation of property without due process of law.

MR. JUSTICE PITNEY delivered the opinion of the court. . . .

The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for

the dependents of those whose injuries result in death. . . .

. . . So far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in *New York C. R. Co. v. White*, decided this day. It is true that in the Washington Act the state fund is the sole source from which the compensation shall be paid, whereas the New York Act gives the employer an option to secure the compensation either through state insurance, insurance with an authorized insurance corporation or by a deposit of securities with the state commission. But we find here no ground for a distinction unfavorable to the Washington law.

So far as employers are concerned, however, there is a marked difference between the two laws, because of the enforced contributions to the state fund that are characteristic of the Washington Act, and it is upon this feature that the principal stress of the argument for plaintiff in error is laid. . . .

If the legislation could be regarded merely as substituting one form of employer's liability for another, the points raised against it would be answered sufficiently by our opinion in *New York C. R. Co. v. White*. . . .

But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not; so that however prudently one may manage his business, even to the point of immunity to his employees from accidental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors. . . .

Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it. . . .

. . . The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration . . . the considerations to which we have adverted in *New York C. R. Co. v. White*, *supra*, as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous

occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation or as tending to encourage the performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the State? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. . . . It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the State are not thus circumscribed by the Fourteenth Amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process

of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be so, the corresponding burden upon the industry cannot be regarded as excessive if the State is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in *New York C. R. Co. v. White*, that, in sustaining the law, we do not intend to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable, and that any question of that kind may be met when it arises.

Upon the third question,—the distribution of the burden,—there is no criticism upon the act in its details. As we have seen, its 4th section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay roll of the industry cannot be deemed an arbitrary adjustment, in view of the legislative declaration that it is "deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." It is a matter of common knowledge that, in the practice of insurers, the pay roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provision requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund from

accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that the fund shall ultimately become neither more nor less than self-supporting, and that the rates are subject to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent effort to limit the burden to the requirements of each industry. . . .

We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York C. R. Co. v. White* . . . or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human

wastage as to leave no fair profit beyond it, the State is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry, they

will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation. . . .

V. THE PRESENT STATUS OF WORKMEN'S COMPENSATION LEGISLATION

PRINCIPAL FEATURES OF COMPENSATION LAWS ¹

At the beginning of 1940 all of the States except two (Arkansas and Mississippi) had compensation laws in effect. In addition, such laws are operative for the benefit of employees in the District of Columbia, Puerto Rico, Alaska, Hawaii, and in the Philippines, and for civil employees of the Federal Government, and for longshoremen and harbor workers. As a result, there are now in operation in the United States no less than 53 independent compensation laws which have been drafted and put into effect over a period of some 30 years. All agree in their main objective, which is the payment of benefits to injured employees or to the dependents of those killed in industry, without regard to the question of negligence. But similarity almost ends here,

for the application of the principle presents a great diversity of details in the various laws. This extends not only to the primary factors of the scope of the laws and the amount of compensation payable under them, but also to the matter of making the laws compulsory or voluntary, the securing or not securing of the payments of benefits, the mode of securing such payments (where required), the methods of administration, and the question of election or rejection of the act. . . .

INSURANCE

It has become recognized generally that the only satisfactory method of financing the payment of benefits to injured workmen is through insuring the employer's liability. This may be effected through insurance with a private company or in a State fund. Self-insurance is authorized in most of the States. In such cases an employer must be able to satisfy the compensation board that he is financially able

¹ Charles F. Sharkey, "Principal Features of Workmen's Compensation Laws as of July 1, 1940," in Marshall Dawson, *Problems of Workmen's Compensation Administration*. U. S. Bureau of Labor Statistics, Bulletin No. 672 (Washington: Government Printing Office, 1940), pp. 192-218.—E.S.

to cover his risks before he is allowed to carry his own insurance.

In the majority of States the employer is allowed to insure in private insurance companies. However, in Nevada, North Dakota, Ohio, Oregon, Puerto Rico, Washington, West Virginia, and Wyoming an exclusive State fund is maintained, and the employers coming under the coverage of the workmen's compensation law are required to insure their risks in this fund, although in Ohio and West Virginia self-insurance is permitted under certain circumstances. In 11 States competitive State funds are maintained, and the employers have the choice of insuring their risks either in the State fund or with private insurance companies or by self-insurance.

Of the acts . . . 22 are compulsory and 32 are elective. Some of the elective acts, however, are compulsory as to public employees. In Massachusetts, Nevada, and Pennsylvania contractors on public works are compulsorily covered. In 4 States (Illinois, Maryland, Montana, and Washington) the acts are compulsory as to hazardous employments and elective as to other occupations. The Indiana and Iowa laws are compulsory as to coal mining, while in Massachusetts the statute is quasi-compulsory as to certain industries using dangerous machinery. In Texas the statute is compulsory as to motorbus companies.

State insurance systems exist in 19 States. Of these 8 are monopolistic, and 11 operate on a competitive basis. The Idaho statute seems to contemplate an exclusive State fund, but with an option for self-insurance and the deposit of a surety bond or guaranty contract as the means of satisfying the industrial board as to the security of payments. The reports of the board indicate, however, that in practice the system is competitive, and that approved private companies are permitted to do business in the State. The Ohio and West Virginia laws provide for self-insurance as well as for a State fund; they

are, however, listed here as having monopolistic State funds, as no other means of insurance is provided.

In the following States exclusive State funds were established when the original laws were enacted: North Dakota (March 5, 1919); Ohio (June 15, 1911); Oregon (November 4, 1913); Washington (March 14, 1911); West Virginia (February 22, 1913); and Wyoming (February 27, 1915). The original act of Nevada did not provide for any insurance, but on July 1, 1913, a new act became effective providing for an exclusive State fund. The Puerto Rico law, as enacted on April 13, 1916, provided for an exclusive State fund, but in 1928 a new statute authorized employers to insure either in the State fund or with private companies. However, in 1935 this act was repealed and an exclusive State fund was again established.

The laws of the following States as originally enacted provided for a State fund, but in addition permitted insurance with private companies. Colorado (April 10, 1915); Idaho (March 16, 1917); Maryland (April 16, 1914); Michigan (March 20, 1912); Montana (March 8, 1915); New York (December 16, 1913); Pennsylvania (June 2, 1915); and Utah (March 15, 1917). The original statute of Arizona did not provide for insurance, but a new law, adopted November 2, 1925, established a competitive State fund. In California a State fund was created, but employers were not required to insure in it or with private companies. However, in 1917 this was remedied by requiring insurance in the fund or with private companies. The original act of Oklahoma provided for private insurance, but by an amendment adopted in 1933, a competitive State fund was established.

COVERAGE

The compensation laws do not attempt to cover all employments. Railroad employees and other persons engaged in interstate commerce are not covered by

the State laws, as interstate commerce comes within the jurisdiction of the Federal Government. Certain employees are also specifically excluded by the various acts. Some laws apply only to employees engaged in hazardous employments. Casual employees are usually excluded, and generally the laws do not apply to persons engaged in agriculture and domestic service. Most of the State laws cover minors and 14 of the acts (Alabama, Illinois, Indiana, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, and Wisconsin) provide extra compensation in the case of injury to minors who were employed illegally. The United States Employees' Compensation Act applies to all civil employees of the United States, employees of the Alaska and Panama Railroads, Panama Canal, and employees of the government of the District of Columbia. Enrollees of the Civilian Conservation Corps are included, as well as relief employees. The Act also covers employees of the Tennessee Valley Authority, and members of the Army and Navy Reserve Corps.

Numerical exemptions.—In 28 States, employers of less than a stipulated number of employees are exempt. However, voluntary elections are usually permitted in such cases and also in regard to those employments classed as not hazardous, when the law covers only hazardous occupations. . . .

Hazardous employments.—In 9 States the compensation laws apply only to hazardous employments, but in all of these, except Oklahoma and Wyoming, employers and employees in other occupations are permitted to come under the act. The laws of Kansas, Louisiana, and New Mexico are elective, while those of the other States are compulsory. In Illinois and New York the workmen's compensation acts are compulsory as to hazardous industries and elective as to other employments. In New York, however, the lists

of hazardous industries are so comprehensive that practically all employments are compulsorily covered. The New Hampshire act applies only to employers having a specified number of employees, but in hazardous industries the numerical exemptions do not apply. In Missouri the commission may require coverage of hazardous industries without regard to the numerical exemption. In most of these States the industries covered are enumerated, but the list is not complete in several States and in some a blanket clause is used, while in others additions have been made by administrative agencies and the courts.

Public employments.—Employees of the State and its subdivisions and of municipalities are included in 31 States. In several of the States compensation for public employees is compulsory, although it is elective as to private employments. . . .

In four States (Alaska, Arkansas, Missouri, and New Hampshire) public employees are excluded, although in Missouri the law authorizes an affirmative acceptance of its provisions by the State, county, etc., and in New Hampshire, the governor and council, upon petition and hearing, may award compensation to State employees. In Alabama, Arkansas, and Tennessee public employees may be covered by voluntary action.

EMPLOYMENTS EXCLUDED SPECIFICALLY

Agriculture and domestic service.—Agricultural employees are excluded, either expressly or impliedly, from the operation of all workmen's compensation laws except in California (but agricultural employment is included in this State only when the employer's pay roll has exceeded \$500 in the preceding year), Connecticut, Hawaii, Illinois, New Jersey, Ohio, Puerto Rico, and Vermont. Domestic servants are also excluded in all States except Connecticut and New Jersey. In California, however, domestic servants working over 52 hours a week are cov-

ered, and in New York in cities of over 2,000,000 population private or domestic chauffeurs are subject to the act. In most States employers in these occupations may elect to come within the coverage of the compensation law, although in some States it appears that their exclusion is intended to be absolute. Employees engaged in threshing grain, etc., are specifically covered in Kentucky and Minnesota (commercial threshermen and balers). In South Dakota the operation of certain farm machinery for profit is covered, and the Arizona and Philippine acts cover employees engaged in the operation of mechanical implements in agriculture.

Other exclusions.—Employees whose employment is casual and not in the usual course of the employer's trade or business are generally excluded. In a few States employees receiving more than a designated wage are also excluded, and in some States clerical and certain other occupations not considered to be hazardous are not included. Questions involving the coverage of loaned employees, casual employees, and independent contractors have caused much dispute and have been settled in various ways by court decision. The common-law rules determining the master-servant relation or the question of agency have been followed in most instances. . . .

ELECTION

There are 32 States which have elective workmen's compensation laws. In . . . 23 States election is presumed in the absence of positive rejection, this presumption affecting both the employer and employee. . . .

In the other elective States the employer must take positive action, but, if he acts, the employee's acceptance is presumed, except in Kentucky, where he must sign an acceptance. The acceptances are filed with designated State authorities in 6 States (Kentucky, Maine, Michigan, Ne-

vada, New Hampshire, and Rhode Island), while the act of securing insurance signifies election in Massachusetts, Texas, and West Virginia. In Arizona the law is compulsory as to the employer, but the employee may elect not to be covered.

EXTRATERRITORIAL EFFECT OF THE LAW

In about two-thirds of the States the workmen's compensation laws are applicable to accidents happening outside of the State. Generally, the law specifies that the contract of hire shall have been made within the State and either that the employee is a resident of the State or that the employer's place of business is within the State. In the other States, the law contains no statement as to whether it applies to accidents happening outside the State, but the courts of some of these States have interpreted the law as being applicable to such accidents.

The different States have various other provisions, presumably enacted in an effort to limit the extraterritorial application of the law, but Indiana declares that the law applies to an accidental injury occurring in another State or in a foreign country; Hawaii provides that jurisdiction of the several boards extends to injuries occurring on vessels operated by residents of the Territory; and Maryland holds the law applicable to miners working in parts of mines extending underground into another State. In Delaware and Pennsylvania the laws are applicable to employees temporarily outside the State for not more than 90 days and performing service for an employer whose place of business is within the State. The Utah law, after stating that the act applies to injuries received outside the State if the workman was hired in the State, also declares that a workman hired outside the State is entitled to compensation under the laws of the State in which he was hired, and is entitled to enforce his rights against his employer in the courts of Utah.

SUITS FOR DAMAGES

Where both parties have accepted the act, suits for damages are generally forbidden, but in New Hampshire (an elective State) after an injury the employee may choose whether he will proceed under the workmen's compensation act or sue for damages at common law. In most of the States having an elective act, if the employer has accepted the act, an employee who has rejected it may sue, but in this case the employer retains the common-law defenses.

Upon failure of the employer to secure payment of compensation or to provide the insurance required by the act or to pay the premiums, the employee may bring an action for damages, with the common-law defenses removed, in [most] States. . . .

In 9 States, if there is an "intent" on the part of the employer to injure, or if the injury is due to his gross negligence or willful misconduct, the employee may bring suit. . . .

In . . . 15 States, no suits are permitted after both the employer and the employee have accepted the provisions of the compensation act. . . .

WAITING PERIOD

All the States except Oregon provide that during a specified period of time immediately following the injury, compensation shall not be paid. This "waiting" time ranges from a minimum of 1 day to a maximum of 14 days, with the majority of the States requiring a 7-day waiting period. The period for which no compensation is paid has no relation to the requirement that medical and hospital care shall be provided, as the employee is entitled to these benefits immediately. In most of the States if the disability continues for a certain number of weeks, the payment of compensation is retroactive to the date of the injury. . . .

SECOND INJURIES

All of the compensation laws except those of Alaska, Louisiana, New Hampshire, Pennsylvania, the Philippines, Puerto Rico, Vermont, and the United States (civil employees) contain specific provisions regarding payment of compensation in second-injury cases.

When an employee has sustained an accident causing the loss of a member of the body and subsequently loses another in a second accident, he may become permanently and totally disabled, thus increasing the amount to be paid in the form of workmen's compensation. The States have enacted certain second-injury provisions to cope with this situation. About half of the State laws provide that compensation shall be apportioned according to the disability resulting from the injury, the last employer paying only that amount which is attributable to the second injury, while other States provide that in determining compensation for the second injury the decreased earning power (because of the first injury) shall be used as a basis in rendering the award.

"Second-injury funds" have been established in a number of States (Arkansas, District of Columbia, Hawaii, Idaho, Illinois, Massachusetts, Minnesota, New Jersey, New York, North Carolina, North Dakota, Ohio, South Carolina, Utah, Wisconsin, and the United States [Longshoremen's Act]). These funds were created so that when a second accident occurs the employer will have to pay only for the second injury, yet the employee is compensated for the disability resulting from the combined injuries, the remainder of the award being paid from the second-injury fund.

The method of raising revenue to sustain the second-injury fund differs in the several States. One method which appears popular and satisfactory is to place in the fund the amounts awarded in fatal cases in which it has been determined that there

are no surviving dependents entitled to compensation under the law.

SCALE OF COMPENSATION

The amounts actually payable under the various compensation acts are determined by three factors: The rate, usually a percentage of the wages; the term or period of payment; and in most States a fixed maximum or weekly total payment. The amount and method of payment also differ according to the type of the injury. The acts prescribe certain payments in case of death and in case of permanent total disability, and also have specific provisions covering permanent partial disability and temporary total disability.

Percentage of wages.—Alaska, Oregon, Washington, and Wyoming are the only States which do not base the amount of compensation on the wage received by the injured worker. A few States provide fixed lump sums or pensions for certain injuries, but apply the percentage system to all others. In other States, there are varying percentages for different types of injuries and in some the percentage varies with the conjugal condition and the number of children, but in most cases the prescribed percentage remains uniform for all injuries.

Maximum term and amount.—In the great majority of the laws, different maximum terms or amounts are established. It is obvious that the reduction of a workman's income by one-half or even one-third leaves a large portion of his loss uncompensated. The burden on the employer is restricted further (and transferred necessarily to the injured employee and his family), since the term of payment is fixed in most States not by the period of disability but by an arbitrary maximum; death benefits likewise rarely continue for the period of probable need, as only about 8 or 10 States provide for payment of benefits during widowhood or during the minority of children. . . .

Death benefits.—It will be noted that

the methods provided for determining compensation for death vary considerably and do not in all cases depend upon the fact that the deceased was an actual financial benefit to his dependents. Most of the States have not been very liberal in prescribing the amount of compensation to be paid to dependents, although several of the laws have been amended in recent years to increase the amount. In Arizona, Nevada, New York, Oregon, Washington, West Virginia, and the United States (Civil Employees' Act), the law provides for the payment of benefits to a widow for life or until remarriage, and in the case of children until a specified age is reached. The majority of the other States have a similar provision but limit the total amount payable. In Utah the industrial commission is given authority to pay benefits indefinitely in meritorious cases. Oklahoma pays no death benefits.

In a few States, the death benefits are limited to monthly payments for a specified period, while others set a total maximum ranging from \$3,000 to \$15,000. The remarriage of the widow usually terminates the benefits in about half of the States, although in a few jurisdictions a lump sum is payable upon remarriage. The experience of some State commissions, as shown in their reports, indicates that a life benefit to the widow with additional amounts for each child under the age of 18 is the best system to adopt in rendering assistance to the dependents following the death of a workman from an industrial accident or disease.

Funeral benefits are provided in all States except Oklahoma, which does not compensate for death. In some States such benefits are given only when there are no beneficiaries.

Disability benefits.—Compensation is paid in four designated classes of disability—permanent total, permanent partial, temporary total, and temporary partial. The term "disability" has been defined in varying ways by the courts in interpreting

State compensation laws. Some hold that it means inability to earn wages, or full wages, at the work in which the employee was working at the time of the injury, while other courts have held that it means the inability to perform any kind of work which might be obtained. A few courts have interpreted the term to mean inability to obtain work.

It will be observed that there is an apparent tendency to recognize the greater economic loss in case of permanent total disability than in case of death. Although death benefits continue for life or until the remarriage of the widow in only 7 States, life benefits are paid for permanent total disability in 17 jurisdictions. . . .

PERIOD OF BENEFITS FOR PERMANENT PARTIAL DISABILITY

Awards of compensation for injuries causing permanent partial disability are made by two methods—payment of a percentage of the wage loss and payment for fixed periods for specified injuries. These two methods exist side by side, as the laws have schedules covering certain specified injuries, and those not included therein are compensated on a percentage basis. In Alaska, Washington, and Wyoming the payments are fixed sums, but in all other States the schedule payments are weekly amounts based on wages, except in California where the amount of the benefit depends on the age and occupation of the employee.

In some States the scheduled provisions provide for payments in addition to the period of total disability (healing period) or they may cover the entire allowance for the injury other than medical aid. Such payments are exclusive in 25 States and in addition to the healing period in 29 jurisdictions. In Maine the payment prescribed in the schedule is in lieu of payments for temporary total disability, but a subsequent partial disability is compensated for not more than 300 weeks from the date of the injury. The New

Hampshire law provides for additional compensation for the healing period except in the case of loss of hearing.

Under the Massachusetts law, compensation is paid for the period of total disability and also for partial disability after the scheduled period; the same is true in Rhode Island, subject to a maximum number of weeks. Schedule payments are normally in lieu of all other payments under the New York act, but if the period of total temporary disability is protracted beyond designated periods the schedule period is extended correspondingly. In Georgia a uniform period of 10 weeks is allowed as healing time. . . .

MEDICAL BENEFITS

In all the States medical aid is required to be furnished to injured employees, usually in addition to compensation payments. In some States additional amounts are allowed for hospital expenses, while in others artificial limbs and other appliances are furnished. . . . Seventeen States limit neither the amount nor the time during which aid shall be rendered; 12 other States limit the amount but not the time; 12 States limit the time but not the amount; and in 13 States there is a restriction on both the amount and the time. . . .

Medical benefits are without cost to the workmen in the great majority of the States, but in Alaska the employer may deduct from the employee's wages \$2.50 per month to maintain a medical fund. In Arizona and Nevada one-half the cost but not over \$1 per month may be deducted, while in Washington one-half of the cost must be paid by the workman. . . .

ADMINISTRATION AND SETTLEMENT OF CLAIMS

There are two general methods of administration of the workman's compensation laws: (1) By an administrative commission or board created for the pur-

pose of enforcing the provisions of the law, and (2) by the courts. When administration is left to the courts it is usually because no other machinery for administration has been created and this law, like other laws, is enforced in the various Federal, State, and county courts.

The desirability of an administrative agency charged specifically with the supervision of the compensation laws is recognized by all but seven States (Alabama, Alaska, Louisiana, New Hampshire, New Mexico, Tennessee, and Wyoming). However, in Alabama there is limited supervision by the department of industrial relations, and in Wyoming the workmen's compensation fund is under the supervision of the State treasurer. In these seven States the agreement between the parties may be without supervision or there may be provision for approval by the court. Summary procedure is generally directed, but a trial jury may be demanded in certain cases.

It is generally agreed that administration of a workmen's compensation act by an administrative agency is more satisfactory than administration by the courts. The major difficulties of court administration have been summed up as (1) delay, (2) cost, and (3) the unfitness of the courts for the settlement of compensation claims. A complete understanding of industrial conditions is essential in successful administration of the laws. The vital factors in successful administration are the giving of prompt, honest, and full compensation and immediate medical aid, as required by the law. To achieve these purposes an administrative board or commission is almost essential.

In States where the law is administered by a commission or board, appeals to courts are usually limited to questions of law, the determination of facts being left to the exclusive jurisdiction of the commission.

ACCIDENT REPORTING AND PREVENTION

The workmen's compensation acts of only 25 States require that reports be made of all industrial accidents. In 13 States the acts require reports of accidents which cause disability of 1 day or more, and Rhode Island requires reports of all accidents causing disability for more than 2 days. In North Carolina and South Carolina employers must report accidents causing disability for more than 3 days. The Maryland law provides that accidents causing disability for more than 3 days must be reported, and by recent enactment notice must be given promptly after knowledge of disability caused by an occupational disease.

Notice must be given when the disability lasts 1 week in Georgia and Tennessee, and in Illinois notice must be given when the injury is fatal or the disability is for more than 1 week. In Alabama employers must give notice when the disability lasts for more than 2 weeks. Under the New Jersey law insured employers are required to report all accidents and compensable occupational diseases, whereas uninsured employers need report only those causing disability for more than 1 week or causing any permanent disability. The Minnesota act requires reports of all accidents causing death or serious injury, as well as other accidents causing disability for more than 1 day. In Nebraska, New Hampshire, West Virginia, and Wisconsin, accident reports are submitted in the manner and at the time required by administrative authorities. Although there is no provision requiring reports in the Alaska law, a separate act provides for the reporting of accidents in coal mines.

These provisions of the State compensation laws clearly illustrate the lack of uniformity on the subject of accident reporting. The importance of complete reports showing causes, nature, severity, and costs has been too little recognized, even

among those charged with the administration of the laws, while the employer has been too prone to minimize or disregard the occurrence of accidents except as an unfortunate incident involving some form of liability.

Existing deficiencies in the compensation laws in regard to accident reporting and prevention are offset to some extent by the fact that a few industrial States have inspection agencies which are charged with the duties of prevention of accidents, chiefly by way of enforcing safety statutes, although some agencies also prescribe standards. Some attempt has been made in the direction of combining compensation administration with the enforcement of labor laws generally, although the majority of the States distribute the responsibility among several agencies. However, in some States the agency administering the compensation law is also given certain additional powers as to safety devices, inspection, etc.

COST OF COMPENSATION

In almost all of the States, the cost of compensation is borne entirely by the employer, although in some of the States having a State insurance fund a small part of the cost is shifted to the public. In the following States the employees are permitted to make contributions: Oregon, in which deductions of 1 cent per day are made to help cover the cost of compensation; Alaska, Arizona, Nevada, and Washington, where employees contribute to the medical benefit fund; and Colorado, Idaho, Kentucky, Montana, and Oregon, where the employees may contribute toward cooperative hospitals, etc. The original occupational-disease law of Washington required equal contributions by employers and employees, but in 1939

an amendment was adopted repealing this provision.

NONRESIDENT ALIEN DEPENDENTS

None of the workmen's compensation acts makes any distinction between resident aliens and resident citizens, but a large number have discriminatory provisions in the laws affecting nonresident alien dependents. Under the liability system, the rule had become almost universal that such dependents should have the same status as residents or citizens of the States; but of the 22 State compensation laws on the statute books at the close of the year 1913, nearly one-third (7) made discriminations unfavorable to such claimants, while in 1916, of 35 States, nearly one-half effected discriminations. At the present time, of 54 laws analyzed, 39 have provisions more or less discriminatory. Thus an increasing tendency in the direction of less favorable treatment is noted. Such discrimination may be by way of exclusion, reduced benefits, permitting commutations to lump sums in reduced amounts, restricting possible beneficiaries to persons of a designated relationship (a provision that may exist alone or in connection with reduced benefits), not extending the presumption of dependency to aliens who are nonresidents, or excluding payments to beneficiaries in countries with which the United States does not maintain diplomatic relations.

Nonresident aliens are placed on the same footing as residents in 5 States, while in 10 they are not mentioned. The laws of a number of States except residents of Canada from the discriminatory provisions, or declare such provisions subject to conflicting terms of any treaty, or deny all benefits to aliens whose national laws would exclude citizens of the United States in like circumstances. . . .

OCCUPATIONAL DISEASES

Compensation for occupational diseases has until recently been rather neglected by American legislatures. This has been due to (1) the slow growth of knowledge concerning the relation of working conditions to disease, and (2) the fact that most cases of occupational disease, because they are not spectacular, fail to arouse as much public indignation as, say, a sensational mine disaster in which many men are killed. It is much easier to secure legislative action when there has been some spectacular occurrence than when the conditions complained of are relatively unnoticed. Undoubtedly, the wide publicity given in recent years to cases of silicosis and of radium poisoning have tended to accelerate the movement toward compensation for occupational diseases.

American laws on this subject fall into three classes. The first are the so-called "schedule" laws. Here, the workmen's compensation law lists a number of occupational diseases (e. g., silicosis, "the bends," anthrax) for which compensation is to be given. In the second type, the "blanket" laws, the legisla-

ture provides that compensation is to be given for all diseases peculiar to the occupation in which the worker was engaged. In the third type, the legislature has substituted the word "injury" for the word "accident" in its workmen's compensation law, and the courts have interpreted "injury" to include diseases.

In view of the close relationship of occupational diseases to industrial accidents, the decisions of the courts upholding the constitutionality of the latter would clearly apply to the former. There is, therefore, no question of the right of a state to pass a law giving compensation for occupational diseases. At the present time, roughly half of the compensation laws make provision for diseases; of this number, nearly half of the "disease provisions" have been passed within the past four years. It would appear that the awakened interest in the subject may shortly result in the general practice of covering occupational diseases in the workmen's compensation system.

CHAPTER ELEVEN

UNEMPLOYMENT COMPENSATION

Unemployment is an old and familiar part of industrial society. Even in the full flush of 1929 prosperity, there was an average of nearly 2,000,000 persons in the United States who were willing to work, able to work, and looking for work, but who had no jobs. Since 1929, the depression has intensified the situation and has created what is undoubtedly the single most serious problem facing the worker. In past depressions, fewer people were involved and unemployment did not last so long for the great majority. The unemployed were left largely to their own resources and to the desultory aid given by relatives and private philanthropies. But the

many millions who have been without work for years since 1929 could not be accommodated in this fashion. Government assistance on a vast scale was called for and given. This assistance has included programs for reductions in hours of work (N. I. R. A. and the F. L. S. A.), work-relief plans (C. W. A., W. P. A.), public-works projects (P. W. A., C. C. C.), and out-of-work benefits (F. E. R. A.). Simultaneously, consideration was given to a longer-range program of preventing, or at least alleviating the effects of, unemployment. To this end, the Social Security Act was passed.

I. THE PROBLEM OF UNEMPLOYMENT

THE AMOUNT AND FLUCTUATIONS OF UNEMPLOYMENT ¹

Adequate statistics of unemployment can be obtained only by complete censuses or a compulsory system of registration in connection with an unemployment compensation system covering the entire industrial population. Present data on the extent of unemployment in this country are so incomplete that it is necessary to resort to estimates of the number out of work. Such figures as are available indicate the existence of a large volume of unemployment in both good years and bad, with a concentration of unemployment in the years of cyclical depression. The estimates of unemployment set forth in this chapter indicate that about 70 per cent of the unemployment from 1922 to 1933, inclusive, occurred in the years 1930 to 1933.

Adequate statistics of unemployment are lacking in the United States for a number of reasons. The trade-union movement has not maintained satisfactory records of unemployment among its members; a Nation-wide public employment service is only now in process of development; and unemployment compensation with its corollary of registration of unemployed persons has not been in existence except on a limited basis. Even employment figures, which, until recently, have been collected much more widely than unemployment figures, are chiefly in the field of manufacturing as reported to the United States Bureau of Labor Statistics and to some State labor departments by representative firms. The national census of unemployment in April 1930 and occasional censuses in a few localities constitute practically the only other sources of information.

¹ *Social Security in America* (Washington: Government Printing Office, 1937), pp. 55 ff.—E.S.

The lack of accurate data has necessitated recourse to estimates, among which are the studies of William A. Berridge in *Cycles of Unemployment in the United States, 1903-1922*, and of Hornell Hart in *Fluctuations in Employment in Cities of the United States, 1902-1917*, the estimate of Leo Wolman and Meredith B. Givens of unemployment among nonagricultural labor from 1920 to 1927 in *Recent Economic Changes*, and Paul H. Douglas' estimate of unemployment in manufacturing, transportation, building trades, and mining from 1897 to 1926 in *Real Wages in the United States, 1890-1926*. Douglas' estimate, which covers the longest period of years, is given in table below. Unfortunately, it does not include the most recent years and is limited in industrial scope. The estimate of Wolman and Givens is wider in coverage, including all employees except those attached to agricultural pursuits, but does not go beyond 1927. Comprehensive estimates of the unemployment in the United States

from 1929 through 1933 have been published by Robert R. Nathan.² His estimates, together with those of Wolman and Givens, are shown in the following tabulation:

Estimated volume of unemployment 1922-1933

[In thousands]

1922 Minimum volume ³	3,441
1923 Minimum volume ³	1,532
1924 Minimum volume ³	2,315
1925 Minimum volume ³	1,775
1926 Minimum volume ³	1,669
1927 Minimum volume ³	2,055
1928	(⁴)
1929 Average volume ⁵	1,813
1930 Average volume ⁵	4,921
1931 Average volume ⁵	8,634
1932 Average volume ⁵	12,803
1933 Average volume ⁵	13,176

In addition to the above estimates of the average annual volume of unemployment, month-to-month estimates are now issued regularly by the American Federation of Labor and the National Industrial Conference Board. The monthly estimates of the former date back to January 1930; those of the latter to January 1933. Both are based on the census of unemployment of 1930, but have deviated considerably, primarily because of differing estimates as to the number of new workers who have entered industry since this census was taken and because of differences in the definition of unemployment. The American Federation of Labor estimates are published regularly in its official monthly magazine, *The American Federationist*; those of the National Industrial Conference Board have appeared in newspaper releases issued from its offices in New York.

² Nathan, Robert R., "Estimates of Unemployment in the United States, 1929-1935," *International Labour Review*, vol. XXXIII, no. 1, January 1936, p. 49.

³ Committee of the President's Conference on Unemployment, *Recent Economic Changes* (McGraw-Hill Book Co., New York, 1929), vol. II, p. 478. Excludes employees engaged in agricultural pursuits.

⁴ No estimate available.

⁵ Nathan, Robert R., *op. cit.*, table 1.

Unemployment in manufacturing, transportation, building trades, and mining, 1897-1926, as estimated by Paul H. Douglas

Year	Per cent unemployed	Year	Per cent unemployed
1897	18.0	1912	7.0
1898	16.9	1913	8.2
1899	10.5	1914	16.4
1900	10.0	1915	15.5
1901	7.5	1916	6.3
1902	6.8	1917	6.0
1903	7.0	1918	5.5
1904	10.1	1919	6.9
1905	6.7	1920	7.2
1906	5.9	1921	23.1
1907	6.9	1922	18.3
1908	16.4	1923	7.9
1909	8.9	1924	12.0
1910	7.2	1925	8.9
1911	9.4	1926	7.5

SOURCE: Douglas, Paul H., and Director, Aaron, *The Problem of Unemployment* (Macmillan Company, New York, 1931), p. 28.

The extent of unemployment varies greatly among different industrial groups. Wolman and Givens in *Recent Economic Changes* estimated that unemployment in 1921 was 23.7 per cent in manufacturing; 26.6 per cent in construction; 14.4 per cent in transportation and communication; 38.1 per cent in mines, quarries, and oil wells; and only 3.7 per cent in public service, mercantile, and miscellaneous industries. In July 1934, on the basis of the American Federation of Labor estimates, 64.9 per cent of all persons engaged in construction industries were unemployed, 38.1 per cent in service industries, 37.4 per cent in mining, 36.2 per cent in railroads, 27.4 per cent in manufacturing, 19.5 per cent in trade, 5.1 per cent in public service, and 1.1 per cent in agriculture.

Within the manufacturing group a wide dissimilarity is also found among the different branches. An analysis of the fluctuations in the employment indexes of the Bureau of Labor Statistics, taking the 1929 and the 1933 averages, indicates decreases in employment since 1929 ranging from 53.7 per cent in the lumber industry, 53.2 per cent in the machinery industries, and 52 per cent in the stone, clay, and glass products industries to 15.4 per cent in the leather industries, 16.1 per cent in textiles, and 16.3 per cent in food manufacturing. Higher unemployment rates are found for industries manufacturing durable goods and lower rates for those manufacturing nondurable goods. For these groups as a whole the decline in employment between 1929 and 1933 was 48.4 per cent in the durable goods industries and only 19.4 per cent in the nondurable goods industries. Over a period of years, however, the relative divergences between these industries would not be so great.

Individual establishments within a branch of any industry also vary widely in their employment experience. Some companies in any given year are expanding and consequently increasing their working force, whereas others are losing

business or possibly extending mechanization and cutting down employment. . . .

Distinct trends may be discerned in employment in different industries over a period of years, with employment increasing in some industries and decreasing in others. This results from a variety of causes such as shifts in consumer demand, new products, displacement of labor by technological improvements, and the effects of tariff policy. During the 1920's there was much talk of technological unemployment, since in those relatively prosperous years employment was decreasing in agriculture, manufacturing, railroad-ing, and coal mining. Most of the labor dispensed with because of mechanization was reabsorbed by manufacturing through an enormous increase in the volume of physical output. David Weintraub, when with the National Bureau of Economic Research,⁶ estimated that of a total of 2,832,000 workers who were displaced by technological improvements from 1920 to 1929, a total of 2,416,000 were brought back into other manufacturing employment, so that there were only 416,000 fewer workers in manufacturing in 1929 than in 1920. At the same time, however, employment was increasing in transportation other than railroading, in communication, in mining other than coal, in quarrying and oil-well drilling, in construction, in mercantile trades, in banking and government, and in various unclassified industries including the service trades. . . . There is, therefore, no clear evidence that unemployment was increasing on the whole as a result of technological improvements, although there was undoubtedly a lag in reabsorption into the same industry or transfer to other industries on the part of those displaced, with much attendant unemployment.

⁶ Weintraub, David, "The Displacement of Workers Through Increases in Efficiency and Their Absorption by Industry, 1920-1931," *Journal of the American Statistical Association*, vol. XXVII, no. 180, December 1932, pp. 383-400.

Opposite trends in employment will also be found in different branches of manufacturing. During the 1920's, while there was a downward trend in employment in manufacturing as a whole and in most industries in that group, a few branches of manufacturing showed an increase in employment. Thus, in contrast to decreased employment in carriage making, there was an increase in employment in automobile manufacture. . . . Likewise, employment was declining on steam railroads, in express companies, and in water transportation, and increasing on street railways, in the Pullman Company, in bus and truck transportation, and in the telephone, telegraph, and electric light and power industries. . . .

It should also be pointed out that geographical shifts take place within an industry so that employment decreases in one area while it is increasing in another. For example, combined employment in the 13 leading branches of the textile industry declined in New England from 322,946 in 1914 to 265,313 in 1929, and increased over the same period in the southern States of North and South Carolina, Georgia, Alabama, and Tennessee from 111,611 to 253,379.

The record of total unemployment does not represent the entire unemployment problem. Account must also be taken of unemployment resulting from working short time. Information on partial or under-employment is even more fragmentary than for total unemployment. The few data which have been collected provide little definite information about part-time unemployment, other than a general substantiation of the commonplace observation that there is a considerable volume of part-time work in "normal" times, and that this volume increases materially in depression years. . . .

It is evident also that a large proportion of the total volume of unemployment over a considerable period of years appears in depressions. In the 16-year period 1900-1915 the unemployment of 5 of those years—1900, 1904, 1908, 1914, and 1915—constituted approximately 45 per cent of the total, and about 70 per cent of the unemployment in the years 1922-33, inclusive, was concentrated in the years 1930-33. There is also considerable fluctuation in employment from month to month during any year. During the year 1928, for example, employment in manufacturing for the United States as a whole was 7.5 per cent higher in September than in January, and the total number of persons employed in Ohio was 13.8 per cent greater in the best month than in the poorest month.⁷

The estimates by Simon Kuznets in *Seasonal Variations in Industry and Trade* indicate that during the period 1923 to 1931 the range in monthly fluctuations in pay rolls from a yearly average index of 100 was 55 in women's clothing, 35 in automobiles, 25 in cement, 19 in steam-fitting, 19 in furniture, and 17 in cigars and cigarettes. . . .

Fluctuations in seasonal employment are especially marked in the construction industries. The 1930 census of the construction industry showed that the number employed in January 1929 was only 56.2 per cent of the maximum number employed in August of that year. Large seasonal fluctuations in employment also occur in mining, railroading, and retailing. All industries have some form of seasonal variation; the difference is one of degree. Some measure must be established to select for special study those industries evidencing seasonal variation in employment of sufficient amplitude to be especially expensive in the operation of a plan of unemployment compensation. Of

It is common knowledge that unemployment fluctuates widely from year to

⁷ "Fluctuations in Employment in Ohio, 1914 to 1929," U. S. Bureau of Labor Statistics, *Bulletin No. 553*.

chief concern here is the industry which has a definite period of the year when employment is materially curtailed, such as is true for the fertilizer or the canning and preserving industries. On the other hand, the employment record which tends

to be level for most of the year but rises rapidly and for a very brief time, such as might be reflected by department-store employment at Christmas, is of no significance or importance for present purposes.

II. PROPOSALS FOR UNEMPLOYMENT COMPENSATION

Various suggestions have been advanced for preventing or alleviating unemployment. These include the regularization of production, the development of huge public works programs, the establishment of home relief systems, the reduction of hours of work and a sharing of the available work among as many workers as possible. It will be recognized at once that all these plans have been adopted in greater or less degree during the past decade, and that most of them constitute an integral part of our approach to the problem of unemployment. Space does not permit a discussion of these devices, and we turn instead to a consideration of the proposals for unemployment insurance.

Unemployment insurance is an important link in the chain of social insurance. Its purpose is to compensate workers to some extent for the loss of income due to unemployment. It may or may not have the more ambitious aspiration of reducing or eliminating unemployment, but it does seek to protect the

worker against the complete cessation of income if he loses his job.

Inevitably, many questions have arisen and many contradictory proposals have been made. Should each employer be held accountable for unemployment of his workers? Should employees contribute to the fund from which compensation is to be given? Should the state contribute? How large should the benefits be? How long should they continue? Should there be a federal plan, or a state plan, or some combined form? What should be the relation between a system of unemployment compensation and a public employment service?

Much of the discussion has revolved around the relative merits of the company-reserve plan, typically referred to as the Wisconsin plan, and the state-wide pooled fund, formerly often called the Ohio plan. There is a fundamental difference in philosophy between these plans, as will be evident from the arguments of their respective adherents given below.

THE WISCONSIN PLAN

The proponents of the Wisconsin act . . . (1) . . . are not yet ready to accept all the kinds of unemployment which now prevail, in good times and in bad, as entirely beyond the reach of preventive effort. They believe that a sustained and concerted attack on unemployment under the spur of a correct allocation of its cost is at least worth trying. (2) They believe that such allocation of cost need not interfere with the provision of adequate relief for the unemployed even though it means

apportioning part of the burden on a different principle than ability to pay. Finally, they are convinced that regardless of the extent to which existing unemployment can be prevented it is of very great importance for the successful operation of our economic system that the cost of maintaining the unemployed be assessed, so far as it can be done rationally, upon specific industries and specific concerns.

The employer-financed company reserve plan of the Wisconsin act is designed to effect this allocation of cost. Under this plan each concern builds up its own reserve, which is normally de-

¹ Harold M. Groves and Elizabeth Brandeis, "Economic Bases of the Wisconsin Unemployment Reserves Act," *American Economic Review*, 24:38, 39-51, March 1934.—E.S.

posited in a general state fund, but is used only to pay compensation to workers laid off by that particular concern. The employer's responsibility for an employee is for a limited period only and in proportion to the time the employee has worked for the employer. The maximum rate of contribution is set at two per cent ² on payroll; but the contribution of a given employer may be reduced or entirely suspended depending on the condition of his reserve account, which in turn depends entirely on the regularity with which he furnishes employment to his workers. Thus each business enterprise is made responsible for the unemployment resulting directly from its own irregular operation, but is protected from bearing any of the cost of unemployment caused directly by the irregularity of other concerns. The law is designed to make unemployment, within reasonable limits, a business cost and requires that a reserve be built up to meet this cost. Under good business practice similar reserves are commonly used to meet the cost of depreciation, taxes, and interest on bonds and mortgages.

The Wisconsin act aims to allocate the cost of unemployment to specific industrial concerns. Regardless of the degree to which prevailing irregularity in employment can be eliminated, the proponents of the Wisconsin plan believe that it is highly important to make at least part of unemployment a cost of producing specific commodities instead of an overhead cost of production in general. The reason for this belief is revealed by an analysis of costs from a social point of view.

There is today in the United States a very wide variation in regularity of operation as between different industries and different plants within the same industry. This means a wide variation in the degree to which industries and plants are themselves carrying the entire cost of their products and reflecting that cost in the

prices they charge. For the industry or plant with widely fluctuating employment repeatedly dumps some or all of its workers upon the community. Unless these workers can be utilized at such times in other concerns or industries, they must be supported by somebody. Correct cost accounting requires that this should be done by the concern or industry for which they are in effect a labor reserve. Otherwise such a concern or industry is not paying the full cost of its production. Instead it is in effect receiving a subsidy. A pooled insurance fund raised by taxation or three-party contributions would formalize and materially increase the extent to which irregularly operating concerns and industries are now thus subsidized. And the subsidy would come largely from the more regular plants and their employees. The effect of this arrangement would be definitely anti-social. . . .

The importance of allocating the cost of unemployment regardless of its preventability is especially great as regards technological unemployment. It is generally assumed that this kind of unemployment is the price of progress, that the employer who replaces men by machines is benefiting society and should be praised not penalized for his action. As for the workers who lose their jobs, it is assumed that they will ultimately be absorbed into other industries and will themselves benefit in the long run through shorter hours and lower prices. In the interval before the adjustment is made, it is assumed that society, which benefits by technological advance, can afford to pay the price of resulting unemployment.

But change is not always progress. Society does not necessarily benefit from every labor-saving device which is introduced. At present technological changes are made if business men decide that the savings will outweigh the new costs which will be incurred. But a very important cost—the burden of supporting the displaced workers—is entirely omitted from

² Four per cent in 1941. Cf. p. 605.—E.S.

this calculation, because it is not, under our present rules, a *business* cost. Hence today the business man's decision to introduce a new machine may be entirely unwise from the social point of view. It may entail loss rather than gain to society as a whole.

To institute a system under which the victims of technological unemployment would be compensated from a pooled insurance fund would in no way remedy the present situation. But allocation of the cost to specific industrial concerns through a company reserve plan would help; it would tend to make the self interest of the business man coincide with the interest of society. Under such an arrangement the business man would not introduce a new machine unless he estimated that the saving therefrom would be enough to outweigh *all* the costs incurred—including the cost of maintaining the displaced workers for a reasonable period until they could be absorbed again into industry. Only if the business costs involved are thus made more nearly equivalent to the social costs can society continue safely to leave to business men the decisions whether or not to introduce technological changes.

It should be noted that no attempt is made in the Wisconsin act to assess the cost of all unemployment upon specific concerns. A given concern is made responsible for a laid-off employee for a limited period of time only and the time is proportional to service with the concern. To hold the specific employer responsible within these limits seems entirely reasonable. The arrangement is based on the assumptions: (1) that some unemployment is within the power of the employer to prevent; (2) that other unemployment which may not be preventable is so regularly associated with particular industries or managements that it is properly regarded as part of their costs. . . .

The proponents of the Wisconsin plan believe that allocation of some of the cost of unemployment to the specific industrial concern will create a valuable incentive to prevention. Through an elaborate analysis of the way in which business operates Professor Morton² attempts to prove that business men now possess incentives to regularization far more powerful than any which could be created by such an allocation. Hence none of the unemployment which now exists is preventable and the stimulus to prevention provided under the Wisconsin act is useless.

Yet Professor Morton himself admits that business men are not guided entirely by logic or reason. He would certainly not contend that their present methods are necessarily the wisest and best, even from their own point of view. History affords numerous examples of reforms forced upon them from the outside which are today universally conceded to be "good business." The shorter workday is an obvious illustration. Even the steel industry now admits that the twelve hour day and the seven day week were bad from the business as well as the labor point of view. Yet it took an immense amount of pressure from legislatures, trade unions, and public opinion to make first the ten hour and then the eight hour day prevail in this country. Even now there are backward concerns and industries which have persisted in working far longer hours. In the same way the prevention of accidents was really "good business" even before the advent of workmen's compensation laws; but it took the pressure of that legislation to make employers to any extent "safety minded." It is equally important to create a "steady work for steady workers" psychology among employers. And no one can tell in advance how potent such a change in mental outlook may

² See Walter Morton, "The Aims of Unemployment Insurance with Especial Reference to the Wisconsin Act," *American Economic Review*, 23:395-412, September 1933.—E.S.

prove. At any rate there are substantial and successful business men who regard it as an extremely important factor. . . .

If a change in employer psychology is of great importance in promoting regularity in employment, how can such a change be brought about? An unemployment compensation plan which assesses the cost on the specific concern should be an effective instrument for this purpose. On the other hand a pooled unemployment insurance fund raised by three-party contributions or an income tax would have quite the reverse effect. It would obviously relieve employers of any responsibility they now feel to provide for their own workers. In fact it is opposed by business men who believe in the possibilities of regularization.

So much for the psychological impetus to prevention inherent in the company reserve plan. It is very possible that its financial impetus will also prove considerable. Professor Morton stresses the present inducements to regular operation contained in existing overhead costs, and concludes that two per cent of payroll is too small an amount to affect any business man's decisions. No demonstration is needed to prove that two per cent of payroll is a small sum compared to the total wage bill, or the cost of raw materials, or of building an addition to plant. But it should be remembered that there are few situations where the possible saving of this two per cent is on one side and all the other savings are on the other. For example, take the question of whether or not to manufacture for stock during the dull season. Labor and raw material will have to be paid for whenever the manufacturing is to be done. If it is done during the dull season there will be saving in overhead through utilization of plant. On the other hand, manufacture for stock involves taxes on stored goods, interest on the money invested therein and a possible loss through a drop in prices. The reasons for and against manu-

facturing for stock may be about evenly balanced, in which case the desire to conserve an unemployment reserve fund and avoid payment of two per cent into it may well be a decisive factor. The same line of reasoning holds true for other stabilization devices—off-season discounting, diversification of products, and so forth.

In stressing already existing incentives to regular operation the critics of the Wisconsin law have overlooked the fact that regularity of operation and the prevention of unemployment are not entirely coincidental. Assume that the desire to avoid the two per cent assessment will not induce a given employer to operate a given line or department more steadily than before. He will still be stimulated to conserve his unemployment reserve fund by finding other jobs for the workers he must lay off—either in other departments of his own concern or elsewhere. Or he may decide to reduce hours all around and divide up the work, since under the Wisconsin act no benefits are payable to workers who are receiving as much as half-time employment. It should be noted that the present incentive for the share-the-work movement is purely humanitarian; and, despite much advertising, the practice has been far from universal. Perhaps some unemployment can best be prevented by concerted action of all the employers in a community. The best way is to give each individual a clear-cut financial incentive to cooperate.

In his belief that nothing can be done to prevent prevailing unemployment Professor Morton is at variance with representative and respectable business opinion. . . .

The statements of American business men about regularization are significant. Even more significant are their achievements. It is fashionable nowadays to scoff at the regularization of such firms as Eastman Kodak, Dennison, Hills Brothers, Filene's, etc., to explain that each one

of them is "different" or to point to the failure of some of them to run steadily throughout the worst depression in history. Actually their performance even in this period has been strikingly better than that of unstabilized concerns. And in the preceding decade they constituted a notable exception to the prevailing irregularity and violent fluctuations to be found even in the most prosperous and most rapidly expanding of industries such as radios and automobiles. Professor Morton holds that one concern cannot stabilize in an unstable world, yet there are achievements to refute him in practically every line of industry.

Moreover, he never considers what might happen if the attempt to stabilize were being made all along the line. The Filene store which sells furs in August makes it possible for some furriers to start work long before their normal season. The Packard Company which makes cars all the year round helps at least a little to stabilize the steel industry. The makers of Thom McAn shoes consume leather at a constant rate throughout the year—the effect on the tanneries is obvious. The influence of stabilization could also spread in the opposite direction. Seasonal price differentials in steel goods might make enough difference in costs to swing the balance and induce the makers of automobiles or radios to take a chance on manufacturing for stock in off seasons. Even today the influence of a single stabilized concern tends to radiate in all directions. Multiply the focal points and the stabilizing effect might be out of all proportion.

The critics of the Wisconsin law usually admit that something might be done to regularize operations within the normal year. But they tend to dismiss such

an accomplishment rather lightly and to disregard entirely the possibility that it might in turn operate to reduce cyclical or technological unemployment. Yet regularization in normal times clearly involves a check on unwarranted expansion. Less facilities are needed for a given volume of steady production than for the same volume of irregular production. And if under the impetus of legislation on the Wisconsin model such regularization became general, would not general over-expansion be materially reduced? Moreover, regular earnings 52 weeks in the year for the bulk of American wage earners would mean regular and sustained purchasing power. That fluctuating purchasing power is a cause (as well as a consequence) of the business cycle is today very widely accepted. As for technological unemployment, regularization would reveal whether or not a real surplus of labor existed. Other steps for dealing with it, such as shortening hours, might then be more readily undertaken.

So it appears at least probable that a substantial amount of unemployment can be prevented. We may concede that the possibility of prevention cannot be proved by any method of deductive reasoning. But it can be taken as a working hypothesis to be tested experimentally. Such is the purpose of the Wisconsin act. That measure proposes to use the force of social control not only to afford relief to the unemployed but also to give the most effective psychological and financial inducement to business men to regularize industrial operations. No one can say in advance what the result will be. But the stakes in human welfare are high. Surely the experiment is worth trying, not only in Wisconsin but in other states as well. . . .

THE POOLED RESERVE ¹

DR. DOUGLAS . . . Under the plant funds, the unemployed of a given concern can be paid only from contributions made by their specific employer. When the reserves of that particular firm rise to a given maximum (in Wisconsin \$100 per worker), the contributions of the employer cease, and when they fall below a given minimum (in Wisconsin \$50 per worker), the benefits are reduced proportionately, so that by the time the reserve is down to one-tenth of its minimum amount, the benefits are only one-tenth of their normal figure. Under the State-wide fund, the contributions are pooled and paid out to the workers irrespective of who their employer was. The system of plant reserves is advocated chiefly as a preventative of unemployment in the belief that individual concerns will be stimulated to stabilize their operations in order to reduce their contributions. While I have great respect for the originators of this proposal, it seems to me to be inferior to the State-wide funds, for the following reasons:

1. In the first place, its value as a stabilizing device seems to me to be greatly exaggerated. An assessment of 2 or 3 per cent upon the pay roll is in general an addition of only one-third or one-half of 1 per cent upon the total value of manufacturers and is not a strong inducement to stabilize. It could have little or no influence in lessening business depressions which are beyond the control of individual enterprises, and, because of style fluctuations, etc., it would have far less influence in reducing seasonal unemployment than is commonly claimed. Moreover, virtually the same stimulus can be obtained under

a State-wide fund by either varying the contributions by employers according to their volume of unemployment or by rebating some of the contributions back to firms which were successful in inducing stabilizing measures.

2. A State-wide fund will give a greater uniformity of benefits than the plant fund. Unemployment in a business depression does not strike all industries with equal force. It is particularly heavy in the so-called capital or durable-goods industries, such as iron and steel, machinery, automobiles, and construction, and it is comparatively light in consumers' goods industries, such as food and clothing. Under the system of separate plant reserves, the funds of the capital goods industries would be rather quickly depleted, with the result that the benefits of the unemployed in these industries would be greatly reduced, while those in the consumers' goods industries would be relatively unimpaired. Under a State-wide fund, however, the benefits would be maintained uniformly.

3. It is a commonplace of insurance that the greater the pooling of risks and the sweeping together of contributions, the greater the benefits which can be paid. The idle surpluses of some plants and industries are assembled together to maintain benefits as a whole. This advantage in part accounts for the fact that the Ohio pooled fund, with only 50 per cent greater total contributions than the Wisconsin act (i. e., 3 per cent instead of 2 per cent), was able to promise 140 per cent more in maximum benefits; i. e., \$15 a week for 16 weeks instead of \$10 a week for 10 weeks. . . .

¹ *Proceedings of the National Conference for Labor Legislation, 1934*. U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 583 (Washington: Government Printing Office, 1934), pp. 44 ff. *Wisconsin now uses partial pooling.*—E.S.

MR. EPSTEIN. . . . Professor Douglas has already summarized the case for a single State unemployment insurance fund as well as I could possibly do. I

shall therefore merely add a few points to what Professor Douglas has already so excellently stated.

We strenuously object to the individual company reserve plan modeled after the Wisconsin act—and we believe organized labor, as soon as it studies the proposition, will find the same objections—because we are convinced that its tendency is anti-labor and will ultimately thwart unionization. Indeed, company reserves for unemployment insurance are little better than other company welfare schemes. They tie workers to their companies, and the possibility of benefits is made dependent upon the welfare of each particular corporation. By leaving the benefits in an unemployment insurance fund, to be determined by the conditions in each particular company, you are tying workers to the welfare of the concern for which they work just as other welfare plans have done. If their company is more or less stabilized, it is to their advantage to stay with that particular concern and the problem of unionization is made more difficult.

An individual company reserve plan can hardly ever meet the needs of the unemployed. While prosperous companies, like the public utilities, with little unemployment would be able to accumulate large reserves, less stable concerns, such as the building trades which are constantly confronted with unemployment, would be unable to accumulate any funds at all. Thus the intent of the act would be frustrated.

An individual company reserve plan for unemployment insurance is nothing more than a savings plan and has nothing

to do with insurance. Any insurance plan must be based upon the principle of distributing the risk as widely as possible. A State pooled fund makes such insurance possible. If the fund is segregated by individual companies, there is, of course, no pooling of resources whatsoever.

The main reason why the company reserve plan is urged is because its advocates believe that by penalizing the employer to a certain per cent of his pay roll, he will be compelled to stabilize his employment. We cannot believe there is any possibility of forcing employers to stabilize through such a penalty. No amount of moral suasion or penalization can compel a building contractor to lay bricks when he has no contract. We cannot hold employers responsible for unemployment such as we have today, and we believe that they are just as much victims of social and economic forces beyond their control as are their workers. Moreover, even if stabilization could be achieved, it could be done only by reducing working forces to a minimum, thus throwing a further multitude of men out of employment and adding to our present difficulties.

We believe that the chief aim of an unemployment insurance plan should be to provide for the unemployed. Contributions should be made not only by the employers and employees but also by the Government, in order to provide a distribution of the burden of the costs, without which there cannot be real social insurance. The company reserve plan embodies neither the principle of distribution of the risk nor the distribution of the burden. . . .

MERIT RATING

We shall see that most states adopted a plan which aimed to unite the advantages of the Wisconsin idea and the pooled-fund idea. This plan is called merit rating or experience rating. It means that an employer

with a good employment record is allowed a reduction in the amount of his contribution, though he continues to make some payment even if there is no unemployment among his workers. Of course, if merit rating is really

to provide an incentive and if adequate funds are to be collected, the employer with a bad employment record must be penalized by having to make a more-than-normal contribution. The merit-rating plan operates on the theory that employers can eliminate some unemployment and that a saving in the contribution would provide an incentive for them to do so. Quite probably, the chief effect of merit rating will be to afford some saving

to those employers whose businesses are fairly stable, for in most situations the saving would be great enough to cause an employer to take any great pains to avoid unemployment. It is especially unlikely to cause changes in managerial methods if merit-rating is not carried to the extent that it is in Wisconsin, that is, if the employer is not permitted to avoid contributions completely if he can show a "good record."

A ROLE FOR THE FEDERAL GOVERNMENT IN UNEMPLOYMENT COMPENSATION ¹

Although the depression increased interest in unemployment compensation, it had been established in the United States on a voluntary basis to some extent long before. As elsewhere, its beginnings date back to the out-of-work benefit systems undertaken by the trade-unions. Although the first union plan in this country was established as early as 1831, less than 100,000 union members were covered by unemployment benefit plans in 1934. Several unions, chiefly in the garment trades, reached agreements with the employing firms which included provisions for guaranteed employment and unemployment benefit plans. At their height these joint plans covered slightly more than 65,000 workers. Many of these have since been abandoned. Recurrent depressions in the last 20 years also stimulated a few companies to initiate voluntary systems. In 1934 they affected less than 70,000 employees, however, and more than half of the employees covered were in a single company. Altogether, experience with these plans indicates the inability of voluntary efforts to cope with the problem of unemployment.

Legislative efforts for unemployment compensation have lagged behind the voluntary efforts of employers, trade-unions, and employers and employees acting

jointly. Following the depression of 1914-15, the first attempt to obtain an unemployment compensation law was made in the United States, when a bill was introduced in the Massachusetts legislature in 1916. The bill was modeled on the British act of 1911 in that it required contributions from employees, employers, and the State government, but even at that early date preparation was made for future developments by relating contributions and benefits to wages. No action was taken and it was not until the depression of 1920-22 that once more unemployment compensation bills were introduced in the State legislatures of Connecticut, Massachusetts, Minnesota, New York, Pennsylvania, and Wisconsin. Only one of these, the bill introduced in New York in 1921, followed the 1916 Massachusetts bill. The others were modeled after the Huber bill, drafted by Professor John R. Commons of the University of Wisconsin and first introduced in the Wisconsin legislature in 1921. This bill applied the principles of American experience with workmen's compensation to the relief of unemployment. The cost was to be borne entirely by the employer, in order to force him to stabilize his employment. The insurance was to be carried with a mutual company under the control of a compensation insurance board which was to classify industries according to their risk. In modified forms the bill was introduced at every

¹ Social Security Board, *Unemployment Compensation: What and Why?* (Washington: Government Printing Office, 1937), Ch. IV.—E.S.

meeting of the Wisconsin legislature until an unemployment compensation bill was finally passed.

Little real interest developed during the period of comparative prosperity, but with the onset of the depression interest again quickened. In 1931 alone, 52 bills for compulsory unemployment compensation were introduced in 17 States. (See table below.) These were based largely on the Wisconsin unemployment reserve plan. Various State commissions in California, Connecticut, Illinois, Maryland, Massachusetts, New Hampshire, New York, Ohio, Pennsylvania, Virginia, and other States have studied the problem.

On January 29, 1932, after more than 2 years of severe depression, a law was passed in Wisconsin. Its passage greatly stimulated thought about unemployment compensation. Based on the theory that the employer was responsible for unemployment, it assessed the entire cost on him on the assumption that if he bore the cost of the system, he would make every effort to stabilize employment and thereby prevent unemployment. The law provided for the establishment of individual reserve funds, a provision that did not appear in the original Huber bill. Contributions of each employer were to

Governors' Interstate Commission on Unemployment Insurance, on the initiation of President Roosevelt, then Governor of New York State, early in 1931 reported in favor of a bill very similar to the Wisconsin law. This commission consisted of representatives of New York, Massachusetts, Ohio, New Jersey, Pennsylvania, and Connecticut. The American Association for Labor Legislation, first in 1930 and later in 1933, prepared an "American plan" which, like the Wisconsin law, laid its emphasis on reserves rather than insurance and on prevention rather than relief, although it provided for industry reserves rather than individual employer reserves.

Although the Wisconsin law greatly influenced legislation in this country, equally important was the report of the Ohio Commission on Unemployment Insurance in the fall of 1932. It favored a State-wide pooled fund under public control, with joint contributions from employers and employees. A bill embodying these ideas was introduced into the Ohio Legislature and was copied in the bills introduced in Michigan and Illinois. During the legislative session of 1933, almost as many bills of the Ohio type were introduced as of the Wisconsin type. Unemployment compensation bills passed one house in Ohio, Maryland, Connecticut, Utah, Minnesota, California, and New York. While these bills were killed in every instance in the other house, sentiment in favor of unemployment compensation was undoubtedly growing.

Perhaps the principal and most effective argument accounting for the failure of the State bills was that if one State were to pass a law, the employers of the State would be placed at a competitive disadvantage with respect to employers in States with no laws. It was to remove this obstacle to State action that proponents of unemployment compensation first began to urge that the Federal Government take some action.

State bills providing for compulsory systems of unemployment compensation in selected years, 1916-36

Year	Number of States	Number of bills
1916	1	1
1921	3	4
1923	2	3
1925	2	2
1927	4	5
1929	5	5
1931	17	52
1933	23	83
1935	33	102
1936	32	134

be kept separate and available for benefits only to his unemployed workers. The

A resolution had been introduced in Congress in 1916 creating a committee to draft a national unemployment insurance fund, but not until 12 years later, in 1928, did this subject again become a matter for serious discussion. In that year, Senator Couzens introduced a resolution for an investigation of the subject of unemployment and unemployment compensation by the Committee on Education and Labor. After hearings, the Committee reported that legislation for compulsory unemployment compensation was premature, but it favored the voluntary establishments of unemployment reserve funds by employers.

Little or no voluntary activity resulted. Under a resolution introduced by Senator Wagner in 1931, another investigation was made of the experience with unemployment insurance in foreign countries. The committee endorsed compulsory unemployment compensation but felt that the Federal Government's role should be limited to allowing credit against Federal income taxes for contributions by employers to State unemployment reserve funds. Although Senator Wagner introduced several bills embodying the principle, none of them ever came to a vote.

In February 1934 Senator Wagner and Congressman Lewis jointly offered a bill to encourage the States to pass unemployment compensation laws. This bill attempted to remove the stumbling block to State action by levying an excise tax of 5 per cent on the pay rolls of all employers of 10 or more (with certain exceptions) against which tax an offset was to be allowed equal to the contributions of employers to State unemployment reserve funds meeting the standards laid down in the Federal act. Although this bill received high praise from many experts, labor officials, and employers, it was not reported out of committee.

In part, this result was attributable to the belief of many sincere supporters of unemployment compensation that fur-

ther study of the subject was necessary. On June 29, 1934, the President created the Committee on Economic Security to "study problems relating to . . . economic security" and "report to the President not later than December 1, 1934, its recommendations concerning proposals which in its judgment will promote greater economic security."

The Committee on Economic Security gave careful consideration to the possible alternative procedures in the approach to unemployment compensation in the country. It soon discarded as impractical the idea of voluntary operation and of leaving unemployment compensation legislation solely to the States for action. The fact that only one State had passed a law in the face of the serious depression of the last years was deemed sufficient reason to warrant the Federal Government's taking a hand in the problem. Some way would have to be found so that States having unemployment compensation laws would not put their employers at a disadvantage in competing with employers in States that had no laws. Since this was in effect an interstate problem, its solution required Federal action.

Once the committee was convinced that the problem of unemployment compensation was the direct concern of the Federal Government, the next approach was to determine what the role of the Federal Government should be. Should it establish a compulsory national system of unemployment compensation or should the Federal Government confine its activity to promoting State action and developing a Federal-State cooperative system? A Federal plan which would set up a complete system for the administration of unemployment compensation specifying all benefit conditions had much to recommend it. It offered a chance for the pooling of the risk of unemployment over an area wider than could be possible under State action. It would have made possible the maintenance of a fund on a more

strictly actuarial basis, since the paucity of State statistical information would necessitate pooling all available data to obtain anything like a sound factual background. It would have given uniformity of protection to all employees in the United States exposed to the same risks of unemployment and an easy and readily available way of handling the problem of interstate employees, a problem impossible of solution by individual State action alone and difficult even in a Federal-State system. Such a plan would probably have the approval of the large employers of the country whose operations cut across State lines and who would be definitely opposed to the necessity for functioning under many different State regulations.

On the other hand, against these considerations was weighed the claim that an exclusively Federal system would result in a centralization of administrative functions which might paralyze action. There was the fear that, in such a set-up, bureaucratic methods might flourish. In the absence of experience with unemployment compensation in this country, it was thought that it would be desirable to allow wide latitude for experimentation, in the hope that this would provide uniformity where essential and diversity where desired. This, it was felt, could best be accomplished by a Federal-State co-operative system under which the Federal Government would assume the leadership by removing the disadvantages in interstate competition which would have resulted from purely State legislation. Although recognizing the need for uniformity in State action, it was felt that such uniformity could best be accomplished through voluntary State action encouraged by the Federal Government.

Two types of Federal-State cooperation were given consideration: a subsidy plan under which the Federal Government would grant funds to the States if they passed laws which complied with definite Federal standards, and a credit-offset plan

under which a Federal tax would be levied on all employers and a credit against the tax allowed to all employers who contributed to State unemployment compensation funds. Both these Federal-State cooperative systems contemplated that the Federal Government would impose a uniform excise tax on pay rolls and that the States would pass unemployment compensation laws. Under the subsidy plan the entire amount of Federal tax was to be collected by the Federal Government and a Federal grant distributed to States enacting unemployment compensation laws which complied with standards prescribed in the Federal act. The advocates of the subsidy procedure argued that the standards in the Federal act would result in uniform State legislation; that it would provide a means for uniform recording of statistical experience and other information necessary for national study of the problem and for benefit payments, regardless of the workers' mobility. It was felt, however, that the States might constantly look to the Federal Government to increase the grant since they had no part in the collection of contributions or the Federal tax and that the State laws would be too dependent on Federal legislation.

The second type of Federal-State system was the credit-offset plan, providing for a Federal tax levied on the pay rolls of all employers and a credit up to 90 per cent of the tax allowed for contributions paid by employers into a State unemployment compensation fund. This contemplated that the Federal Government would not attempt to regulate in detail what the States should include in their unemployment compensation laws. It would not set up a Federal system of unemployment compensation but would make it possible for the States to pass laws. It would permit complete freedom to the States as to the type of State law to be adopted, the length of the qualifying period, benefit rates and duration, wait-

ing periods, claims procedure, and all the other substantive provisions; but at the same time it would provide for an equal burden on all employers by the imposition of a Federal pay-roll tax. Uniformity was also to be obtained to the extent that contributions could be expended solely for benefit purposes and by the deposit of State funds in the Federal Treasury. Like the subsidy plan, it provided for Federal supervision, but permitted far more local responsibility through State collection of contributions, payment of benefits, and development of all the details of the law in the States, thus utilizing the traditional American methods and local machinery in the administration of labor laws. Although the subsidy plan could operate only if it received an adequate annual appropriation by Congress, the credit-offset device provided that, since contributions were collected directly by the State, administration would not depend so completely on Federal action. In this connection, it was assumed that there would be no pressure for increased expenditures by the Federal Government since benefits came solely from contributions paid into the State fund.

The tax-offset method was finally incorporated in the unemployment compensation provisions of the economic security bill which was introduced by Senator Wagner and Representatives Lewis and

Doughton on January 17, 1935. The bills were referred in the House to the Committee on Ways and Means and in the Senate to the Committee on Finance. Hearings were begun almost immediately. Testimony was received from labor-union officials, industrialists, prominent citizens, and experts in the field, and careful and prolonged consideration was given the bill. The volume of hearings ran to 1,141 pages in the House and 1,354 pages in the Senate. In a revised form the social security bill came up for consideration in the House of Representatives on April 11 under a rule permitting complete freedom of amendment. Debate lasted until April 19 when the bill was passed by a vote of 372 to 33. Following passage in the House, the Senate Finance Committee considered it during 2 full weeks in May and reported it favorably, with amendments, on May 20. The Senate debated the bill from June 14 to June 19, when it was passed by a vote of 77 to 6. In both Houses, an overwhelming majority of both parties supported the measure. Following a period in which both Houses tried to adjust their differences, the conference committee's report was adopted in both Houses without even a roll call, in the House on August 8 and in the Senate on August 9. On August 14, 1935, the President approved the Social Security Act, which became effective immediately.

III. THE SOCIAL SECURITY ACT AND UNEMPLOYMENT COMPENSATION

A SUMMARY OF THE FEDERAL PROVISIONS¹

The passage of the Social Security Act marked the beginning of a new era in our social policy. The act, which is divided into eleven titles, attempts to offer protection against many of the major hazards of modern economic society. Fed-

eral aid is granted to the States for the needy aged, for dependent children, for the blind, for maternal and child welfare, for vocational rehabilitation and for public-health work. A national system of old-age benefits is provided. The Federal Government for the first time, on a Nation-wide scale, made an effort to aid in providing some reasonable degree of eco-

¹ Social Security Board, *Unemployment Compensation: What and Why?* (Washington: Government Printing Office, 1937), Ch. V.—E.S.

conomic security during unemployment—other than on a relief basis—for those who ordinarily were employed. Titles III and IX of the act deal with unemployment compensation. They do not set up a Federal system of unemployment compensation but make it possible for the individual States to establish their own plans of unemployment compensation by removing the major obstacle of interstate competition. Title IX levies a pay-roll tax of 1 per cent in 1936, 2 per cent in 1937, and 3 per cent in 1938 and thereafter, on employers of eight or more persons. Certain employments are excepted from this tax, such as services in the nature of agricultural labor, domestic service in a private home, shipping on the navigable waters of the United States, service in the employment of one's immediate family, Government service—Federal, State, and local—and service for certain agencies operated on a nonprofit basis. The tax is based upon the wages payable for services not excepted above and is collected by the Bureau of Internal Revenue of the Treasury Department. One of the results of the tax levied equally upon employers throughout the country is to remove a major obstacle to State action, for all employers are affected substantially the same, whether or not the State passes an unemployment compensation law.

Against the Federal tax, the employers may credit the amounts which they contribute to unemployment compensation funds under a State law approved by the Social Security Board, but such credit may not exceed 90 per cent of the Federal tax. In other words, if a State passes an unemployment compensation law that is approved by the Social Security Board, the employers of the State, instead of paying the entire Federal tax, pay only 10 per cent into the Federal Treasury, while the rest remains in the State fund for the payment of benefits to the eligible unemployed population of the State.

In order to be approved by the Social

Security Board, the State unemployment compensation law must include provisions that:

- (1) All benefits shall be paid through public employment offices, or such other agencies as the Board may approve;
- (2) No benefits shall be paid for unemployment occurring within 2 years after the first day with respect to which contributions are first required;
- (3) All contributions to the State fund shall be immediately transferred to the unemployment trust fund of the United States;
- (4) Money withdrawn from the unemployment trust fund shall be used only for the payment of benefits;
- (5) Benefits shall not be denied any otherwise eligible individual for refusing to accept any work vacant due directly to a trade dispute; if the wages, hours, or other conditions are substantially below those prevailing for similar work in the locality; if as a condition of being employed a worker has to resign from or refrain from joining a labor organization or would be required to join a company union;
- (6) The State law must provide that no vested rights are created which prevent modification or repeal of the State law.

These requirements do not prescribe the fundamental provisions of a State unemployment compensation law but are intended merely to define a genuine unemployment compensation law as distinguished from relief and to safeguard the solvency of the fund and prohibit use of the funds to lower labor standards. Definitions of who shall contribute to the State fund, the amount and duration of benefits, eligibility requirements, and similar questions, are all left entirely to the discretion of the States in formulating their own laws.

Every genuine unemployment compensation law provides that benefits shall be paid through public employment offices in order that public control shall attend the payment of benefits, and only persons genuinely unemployed and unable to obtain work shall receive benefits.

The requirement that a 2-year period elapse between the time contributions be-

gin and benefits are first paid was inserted because it was necessary to provide a period for the accumulation of funds before benefits began. The imposition of a 1-per cent tax the first year, a 2-per cent tax the second, and a 3-per cent tax the third year and thereafter, made it probable that most States would require a contribution rate equal to only nine-tenths of the Federal tax, thus providing for the full credit allowed to employers and at the same time not assessing them for any greater amount than that which the employers in other States without unemployment compensation laws must pay to the Federal Government.

The provision that contributions be deposited in the Federal Treasury was designed to make these funds readily available to stabilize employment and to assure their absolute security. If their investment were in the hands of varying State agencies operating under varying State fiscal requirements, they might be thrown on the market and liquidated when a depression began and drains on the fund became great. The effect on the financial structure of the country might be so serious as to cause greater unemployment.

The requirement that money withdrawn from the unemployment trust fund be used solely in the payment of unemployment benefits was designed to make certain that the State laws were genuine unemployment compensation laws and that the funds would not be dissipated for other purposes.

The costs of administration of the State laws are not paid from the contributions of employers and employees but, according to title III of the Social Security Act, are paid by the Federal Government out of the general funds of the Treasury if the State laws are properly administered.

In order to receive grants for administrative purposes, the State laws must be approved by the Social Security Board under title IX and also provide:

- (1) Such methods of administration as are calculated to insure full payment of benefits when due;
- (2) Opportunity for a fair hearing before an impartial tribunal for all whose claims to benefits have been denied; and
- (3) Full and complete reports to the Social Security Board on the activities under the State laws, and requested information to other Federal agencies engaged in the administration of public works or assistance.

These conditions were designed to secure an efficient administration by the several States and to assure applicants for benefits that they would be given every opportunity to state their case fairly before an impartial board. Reports from the State agency to the Social Security Board were deemed necessary if the Board was to keep in touch with the developments in State programs and know whether their laws were being properly administered. If unemployment compensation was to be secondary to stabilized employment, there would have to be some active co-operation between the State unemployment compensation administration and other agencies also engaged in doing their part in the solution of the unemployment problem.

The State law may create a State pooled system in which all the contributions are commingled and available for benefit purposes to any employee in the State, or it may provide for individual employer accounts where contributions from each employer are available for benefits only to his own employees, or for a combination of these two plans. It may authorize individual accounts under guaranteed employment plans where the employer guarantees his employees at least 30 hours of work a week for 40 weeks in the year. It may provide for scaling of contributions according to the benefit experience of individual employers or industries contributing to the pooled fund. Under any type of plan, if reduced contributions are permitted by State law under prescribed

safeguards, it will eventually be possible for employers to secure a credit not only for the amount of contributions which they actually make under State laws but also within certain limits for the amount by which they were permitted to reduce their contributions because of their good experience record.

In order for employers to benefit by these provisions of the Social Security Act and avoid paying the entire Federal tax for 1936, the State in which they operate must pass an unemployment compensation law which is approved before December 31, 1936, under title IX, and must collect contributions thereunder before April 1, 1937. If it fails to do so, the employers of the State will pay the entire Federal tax into the Federal Treasury, and none of the proceeds will be available for the payment of benefits to their unemployed workers.

Wisconsin was the first State to pass an unemployment compensation law, but no other State followed for 3 years, until it was certain that some action in the field would be taken by the Federal Government. Utah, Washington, New York,

New Hampshire, California, and Massachusetts enacted State laws in 1935 before the Social Security Act was actually passed but when it was clearly a matter of months or days before the act would be through Congress. Since its passage, two States and the District of Columbia passed laws in 1935 and 28 in 1936.

By the end of 1936, 35 States and the District of Columbia had passed unemployment compensation laws which had been approved by the Social Security Board. . . . In all they cover about 18,000,000 persons. These State laws vary in many ways. Generally speaking, an unemployed worker covered by these laws, after a specified waiting period, will receive a benefit of 50 per cent of his full-time weekly wage not exceeding a weekly maximum of \$15 for 15 or 16 weeks a year. But since each unemployed worker must register at a public employment office, jobs may be found for the unemployed persons before the end of the waiting period, or at least before the end of the period during which he is entitled to benefits, and the weekly benefit will follow only if a job is unavailable.

IV. THE COURTS AND THE UNEMPLOYMENT COMPENSATION LAWS

W. H. H. CHAMBERLIN, INC. *v.* ANDREWS

Court of Appeals of New York. 1936.

271 N. Y. 1; 2 N. E. (2d) 22.

CRANE, CH. J. The complaint . . . asks for a declaratory judgment that the New York unemployment insurance law . . . is unconstitutional under both the Federal and the State Constitutions. . . .

The courts can take judicial notice of the fact that unemployment for the last five or six years has been a very acute problem for State and Federal government. There have always been from earliest times the poor and unfortunate whom the State has had to support by means of money raised by taxation. We have had

our homes for the poor and the infirm, hospitals, infirmaries and many and various means for taking care of those who could not take care of themselves. The institutions housing our insane have grown to be an enormous expense, illustrating that the legality of the expenditure of public moneys for vast numbers of those who were without means of support or help has never been questioned.

Another problem has faced society which has been a source of study, discussion, agitation and planning. Unem-

ployment, from whatever cause, has increased enormously in every part of the country, if not throughout the world. Is there any means possible to provide against unemployment, the loss of work with its serious consequences to the family, to the children and to the public at large? When such a matter becomes general and affects the whole body politic, a situation has arisen which requires the exercise of the reserve power of the State, if there be a practical solution. Some have suggested that for the periodical recurrence of panics and hard times, the actuary might be able to work out a scheme of insurance. We need not pause to determine whether this can be done or not. The fact is that in the past few years enormous sums of State and Federal money have been spent to keep housed and alive the families of those out of work who could not get employment. Such help was absolutely necessary, and it would be a strange kind of government, in fact no government at all, which could not give help in such trouble.

The Legislature of the State, acting after investigation and study and upon the report of experts, has proposed what seems to it a better plan. Instead of solely taxing all the people directly it has passed a law whereby employers are taxed for the help of the unemployed, the sums thus paid being cast upon the public generally through the natural increase in the prices of commodities. Whether relief be under this new law of the Legislature or under the dole system, the public at large pays the bill.

We may concede that much of unemployment is due to other factors than business depression. Just what does cause slumps in business, panics and unemployment has never been satisfactorily explained, but a very large percentage of those who are out of work have lost their jobs or positions by reason of poor business conditions and hard times. I can see, therefore, nothing unreasonable or un-

constitutional in the legislative act which seeks to meet the evils and dangers of unemployment in the future by raising a fund through taxation of employers generally.

This act in brief taxes a certain class of employers three per cent on their payrolls. This class of employer includes those who have employed at least four persons within each of thirteen or more calendar weeks in the year 1935, or any subsequent calendar year. The employment of farm labor, of one's spouse or minor child, or employment in certain charities are excluded.

Unequal protection of the laws and unfair classification are charged against this act because employers who have had no unemployment are obliged to contribute to a fund to help those who have lost positions in failing or bankrupt businesses; also because the line is drawn at four employees instead of including all and any employer. We do not think that this narrow view is required by any constitutional provision. People have to live and when they cannot support themselves someone has to look after them. When able-bodied, willing men cannot find work they may be treated as a class, irrespective of their particular calling or trade. The peril to the state arises from unemployment generally, not from any particular class of workers. So likewise, employers generally are not so unrelated to the unemployment problem as to make a moderate tax upon their payrolls unreasonable or arbitrary. As stated before, unemployment and business conditions generally are to a large extent linked together. . . .

What shall we say about this act? At least it is an attempt to solve a great and pressing problem in government. We have had such problems thrust upon our attention arising out of emergencies such as the rent laws . . . the housing laws . . . and the milk laws. . . . The Legislature seeks to meet the future now with-

out waiting for the emergency to arise. Can it do so? Unless there is something radically wrong, striking at the very fundamentals of constitutional government, courts should not interfere with these attempts in the exercise of the reserve power of the State to meet dangers which threaten the entire common weal and affect every home. No large body of men and women can be without work and the body politic be healthy.

The fund, known as the Unemployment Insurance Fund, created under this law, is to be deposited in or invested in the obligations of the unemployment trust fund of the United States government. This is merely a form of security, the moneys never leaving the power or control of the State authorities. Whether we consider such legislation as we have here a tax measure or an exercise of the police power seems to me immaterial. Power in the State must exist to meet such situations, and it can only be met by raising funds to tide over the unemployment period. Money must be obtained and it does not seem at all arbitrary to confine the tax to a business and employment out of which the difficulty principally arises.

It is said that this is taxation for the benefit of a special class, not the public at large, and thus the purpose is essentially private. The Legislature, after investigation, has found the facts to be that those who are to receive benefits under the act are the ones most likely to be out of employment in times of depression. The courts cannot investigate these facts and should not attempt to do so. The briefs submitted show that the classification or selection made by the Legislature has followed investigation and has sought

to reach the weakest spot. Experience may show this to be a mistake. No Law can act with certainty; it measures reasonable probabilities. . . .

Fault is also found, perhaps, with some justification, with the benefit allowed, after a period of ten weeks' idleness, to those who have been discharged or left because of strikes. Here again the Legislature must exercise its judgment, and a full scheme or plan cannot be condemned because the courts may not approve of certain details.

So too, the right to refuse other work of a certain kind when offered has come in for criticism. There may be a diversity of views as to the wisdom of these provisions, but again, these are not matters for the courts to consider unless they become so extreme as to become arbitrary.

Whether or not the Legislature should pass such a law or whether it will afford the remedy or the relief predicted for it, is a matter for fair argument but not for argument in a court of law. Here we are dealing simply with the power of the Legislature to meet a growing danger and peril to a large number of our fellow citizens, and we can find nothing in the act itself which is so arbitrary or unreasonable as to show that it deprives any employer of his property without due process of law or denies to him the equal protection of the laws. . . .¹

¹ See also *Gillum v. Johnson*, 7 Cal. (2d) 744, 62 Pac. (2d) 1037 (1936), *Howes Brothers Co. v. Massachusetts Unemployment Compensation Commission*, 296 Mass. 275, 5 N.E. (2d) 720 (1936), and *Beeland Wholesale Co. v. Kaufman*, 234 Ala. 249, 174 So. 516, upholding the unemployment compensation laws of California, Massachusetts, and Alabama respectively.

CARMICHAEL *v.* SOUTHERN COAL & COKE COMPANY

Supreme Court of the United States. 1937.

301 U. S. 495; 57 Sup. Ct. 868; 81 L. Ed. 1245.

MR. JUSTICE STONE delivered the opinion of the Court.

The questions for decision are whether the Unemployment Compensation Act of

Alabama infringes the due process and equal protection clauses of the Fourteenth Amendment, and whether it is invalid because its enactment was coerced by the action of the Federal government in adopting the Social Security Act, and because it involves an unconstitutional surrender to the national government of the sovereign power of the state. . . .

VALIDITY OF THE TAX UNDER THE
FOURTEENTH AMENDMENT

First. Validity of the Tax Qua Tax. It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. . . .

Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. . . .

This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding prin-

ciple of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

(a) *Exclusion of Employers of Less than Eight.* Distinctions in degree, often stated in terms of differences in number, have often been the target of attack. . . . It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.

Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others. . . . We cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained. For it cannot be assumed that the legislature could not rightly have concluded that generally the number of employees bears a relationship to the size of the payroll and therefore to the amount of the tax, and that the large number of small employers and the paucity of their records of employment would entail greater inconvenience in the collection and verification of the tax than in the case of larger employers. . . .

(b) *Exemption of Particular Classes of Employers.* It is arbitrary, appellees contend, to exempt those who employ agri-

cultural laborers, domestic servants, seamen, insurance agents, or close relatives, or to exclude charitable institutions, interstate railways, or the government of the United States or of any state or political subdivision. A sufficient answer is an appeal to the principle of taxation already stated, that the state is free to select a particular class as a subject for taxation. The character of the exemptions suggests simply that the state has chosen, as the subject of its tax, those who employ labor in the processes of industrial production and distribution.

Reasons for the selections, if desired, readily suggest themselves. Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one, . . . or to restrict or suppress the other. . . . The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficent enterprise. This Court has often sustained the exemption of charitable institutions . . . and exemption for the encouragement of agriculture. . . . Similarly, the legislature is free to aid a depressed industry such as shipping. The exemption of businesses operating for less than twenty weeks in the year may rest upon similar reasons, or upon the desire to encourage seasonal or unstable industries.

Administrative considerations may explain several exemptions. Relatively great expense and inconvenience of collection may justify the exemption from taxation of domestic employers, farmers, and family businesses, not likely to maintain adequate employment records, which are an important aid in the collection and verification of the tax. The state may reasonably waive the formality of taxing itself or its political subdivisions. Fear of constitutional restrictions, and a wholesome respect for the proper policy of another sovereign, would explain exemption of the United States, and of the interstate railways. . . . In no case do appellees sus-

tain the burden which rests upon them of showing that there are no differences, between the exempt employers and the industrial employers who are taxed, sufficient to justify differences in taxation.

(c) Tax on Employees. Appellees extend their attack on the statute from the tax imposed on them as employers to the tax imposed on employees. But they cannot object to a tax which they are not asked to pay, at least if it is separable, as we think it is, from the tax they must pay. The statute contains the usual separability clause. . . . The taxation of employees is not prerequisite to enjoyment of the benefits of the Social Security Act. The collection and expenditure of the tax on employers do not depend upon taxing the employees, and we find nothing in the language of the statute or its application to suggest that the tax on employees is so essential to the operation of the statute as to restrict the effect of the separability clause. . . .

From what has been said, it is plain that the tax *qua* tax conforms to constitutional requirements. . . .

Second. Validity of the Tax as Determined by its Purposes. The devotion of the tax to the purposes specified by the Act requires our consideration of the objections pressed upon us that the tax is invalid because the purposes are invalid, and because the methods chosen for their execution transgress constitutional limitations. It is not denied that since the adoption of the Fourteenth Amendment state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes. . . . The states, by their constitutions and laws, may set their own limits upon their spending power . . . but the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest.

This Court has long and consistently recognized that the public purposes of a

state, for which it may raise funds by taxation, embrace expenditures for its general welfare. . . . The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods. . . .

(a) Relief of Unemployment as a Public Purpose. Support of the poor has long been recognized as a public purpose. . . . We need not labor the point that expenditures for the relief of the unemployed, conditioned on unemployment alone, without proof of indigence of recipients of the benefits, is a permissible use of state funds. For the past six years the nation, unhappily, has been placed in a position to learn at first hand the nature and extent of the problem of unemployment, and to appreciate its profound influence upon the public welfare. . . .

The evils of the attendant social and economic wastage permeate the entire social structure. Apart from poverty, or a less extreme impairment of the savings which afford the chief protection to the working class against old age and the hazards of illness, a matter of inestimable consequence to society as a whole, and apart from the loss of purchasing power, the legislature could have concluded that unemployment brings in its wake increase in vagrancy and crimes against property, reduction in the number of marriages, deterioration of family life, decline in the birth rate, increase in illegitimate births, impairment of the health of the unemployed and their families and malnutrition of their children.

Although employment in Alabama is predominantly in agriculture, and the court below found that agricultural unemployment is not an acute problem,

the census reports disclose the steadily increasing percentage of those employed in industrial pursuits in Alabama. The total amount spent for emergency relief in Alabama, in the years 1933 to 1935 inclusive, exceeded \$47,000,000, of which \$312,000 came from state funds, \$2,243,000 from local sources, and the balance from relief funds of the federal government. These figures bear eloquent witness to the inability of local agencies to cope with the problem without state action and resort to new taxing legislation. Expenditure of public funds under the present statute, for relief of unemployment, will afford some protection to a substantial group of employees, and we cannot say that it is not for a public purpose.

The end being legitimate, the means is for the legislature to choose. . . . If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals. . . .

(b) Extension of benefits. The present scheme of unemployment relief is not subject to any constitutional infirmity . . . because it is not limited to the indigent or because it is extended to some less deserving than others, such as those discharged for misconduct. . . . Poverty is one, but not the only evil consequence of unemployment. Among the benefits sought by relief is the avoidance of destitution, and of the gathering cloud of evils which beset the worker, his family and the community after wages cease and before destitution begins. We are not unaware that in industrial workers are not an affluent class, and we cannot say that a scheme for the award of unemployment benefits, to be made only after a substantial "waiting period" of unemployment, and then only to the extent of half wages and not more than \$15 a week for at most 16 weeks a year, does not effect a public purpose, because it does not also set up an elaborate machinery for excluding those from its benefits who are not indigent. Moreover, the state could rightfully decide not to

discourage thrift. . . . And as the injurious effects of unemployment are not limited to the unemployed worker, there is scope for legislation to mitigate those effects, even though unemployment results from his discharge for cause.

(c) Restriction of Benefits. Appellees again challenge the tax by attacking as arbitrary the classification adopted by the legislature for the distribution of unemployment benefits. Only the employees of those subject to the tax share in the benefits. Appellees complain that the relief is withheld from many as deserving as those who receive benefits. The choice of beneficiaries . . . is thus said to be so arbitrary and discriminatory as to infringe the Fourteenth Amendment and deprive the statute of any public purpose.

What we have said as to the validity of the choice of the subjects of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt . . . or where it is most practicable to deal with it. . . . It may exclude others whose need is less . . . or whose effective aid is attended by inconvenience which is greater. . . .

Third. Want of Relationship Between the Subjects and Benefits of the Tax. It is not a valid objection to the present tax . . . that the benefits paid and the persons to whom they are paid are unrelated to the persons taxed and the amount of the tax which they pay—in short, that those who pay the tax may not have contributed to the unemployment and may not be benefited by the expenditure. Appellees' contention that the statute is arbitrary, in so far as it fails to distinguish between the employer with a low unemployment experience and the employer with a high unemployment experience, rests upon the misconception that there must be such a relationship between the subject of the tax (the exercise of the right

to employ) and the evil to be met by the appropriation of the proceeds (unemployment). . . .

A tax is not an assessment of benefits. It is . . . a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. . . .

Even if a legislature should undertake . . . to place the burden of a tax for unemployment benefits upon those who cause or contribute to unemployment, it might conclude that the burden cannot justly be apportioned among employers according to their unemployment experience. . . .

The Alabama legislature may have proceeded upon the view, for which there is abundant authority, that the causes of unemployment are too complex to admit of a meticulous appraisal of employer responsibility. It may have concluded that unemployment is an inseparable incident of modern industry, with its most serious manifestations in industrial production; that employees will be best protected, and that the cost of the remedy, at least until more accurate and complete data are available, may best be distributed, by imposing the tax evenly upon all industrial production, and in such form that it will be added to labor costs which are ultimately absorbed by the public in the prices which it pays for consumable goods. . . .

RELATIONSHIP OF THE STATE AND FEDERAL STATUTES

There remain for consideration the contentions that the state act is invalid because its enactment was coerced by the adoption of the Social Security Act, and that it involves an unconstitutional surrender of state power. Even though it be assumed that the exercise of a sovereign power by a state, in other respects valid,

may be rendered invalid because of the coercive effect of a federal statute enacted in the exercise of a power granted to the national government, such coercion is lacking here. It is unnecessary to repeat now those considerations which have led to our decision in the *Chas. C. Steward Machine Co.* case, that the Social Security Act has no such coercive effect. As the Social Security Act is not coercive in its operation, the Unemployment Compensation Act cannot be set aside as an unconstitutional product of coercion. The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the

two statutes now before us embody a co-operative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the coöperation of the other. The Constitution does not prohibit such coöperation.

. . . The state compensation act . . . is subject to no constitutional infirmity. . . .

[MR. JUSTICE SUTHERLAND, for himself and JUSTICES VAN DEVANTER and BUTLER, dissented. He held to the view that the law would be constitutional provided it did not pool funds; he approved of the Wisconsin plan of company reserves.

[MR. JUSTICE McREYNOLDS also dissented.]

STEWARD MACHINE COMPANY *v.* DAVIS

Supreme Court of the United States. 1937.
301 U. S. 548; 57 Sup. Ct. 883; 81 L. Ed. 1279.

There was a difference of opinion in the lower federal courts on the constitutionality of the unemployment compensation phases of the Social Security Act. The law was upheld in *Davis v. Boston & Maine R. R.*, 19 Fed. Supp. 97 (1936), *Beeland Wholesale Co. v. Davis*, 88 Fed. (2d) 447 (1937), and *Steward Machine Co. v. Davis*, 89 Fed. (2d) 207 (1937). A contrary decision was handed down in *Davis v. Boston & Maine R. R.*, 89 Fed. (2d) 368 (1937). The matter went to the Supreme Court.

* * *

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act on employers of eight or more is here to be determined. . . .

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of

the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender. . . .

First. The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost or an excise upon the relation of employment.

1. We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the precedents of colonial days we are supplied with illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. Appeal is also made to principle or the analysis of concepts. An excise, we are told, imports a tax upon a privilege; employment, it is said, is a right, not a privilege, from which it follows that employment is not subject to an excise. Neither the one appeal nor the other leads to the desired goal.

As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. . . . But in truth other excises *were* known, and known since early times. . . . Our colonial forbears knew more about ways of taxing than some of their descendants seem to be willing to concede.

The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is a "natural" or "inherent" or "inalienable" right, and not a "privilege" at all. But natural rights, so called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. . . .

The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. "The Congress shall have power to lay and collect taxes, duties, imposts and excises." Art. I, §8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. . . . Whether the tax is to be classified as an "excise" is in truth not of critical importance. If not that, it is an "impost" . . . or a "duty" . . . A capitation or other "direct" tax it certainly is not. . . . At times taxpayers have contended that the Congress is without power to lay an excise on the enjoyment of a privilege created by state law. The contention has been put aside as baseless. Congress may tax the transmission of property by inheritance or will, though

the states and not Congress have created the privilege of succession. . . . Congress may tax the enjoyment of a corporate franchise, though a state and not Congress brought the franchise into being. . . . The statute books are strewn with illustrations of taxes laid on occupations pursued of common right. We find no basis for a holding that the power in that regard which belongs by accepted practice to the legislatures of the states, has been denied by the Constitution to the Congress of the nation.

2. The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine the uniformity exacted is geographical, not intrinsic. . . .

Second. The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

The statute does not apply . . . to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

The Fifth Amendment unlike the Fourteenth has no equal protection clause. . . . But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. They may tax some kinds of property at one rate, and others at another, and exempt others altogether. . . . They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. . . . If this latitude of judgment is lawful for the states, it is lawful, *a fortiori*, in legislation by the Congress, which is subject to restraints less narrow and confining. . . .

The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifica-

tions and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. . . . *Carmichael v. Southern Coal & Coke Co.*

Third. The excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

. . . The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the act, and what is even more important that the aim is not only ulterior, but essentially unlawful. In particular, the 90 per cent credit is relied upon as supporting that conclusion. But before the statute succumbs to an assault upon these lines, two propositions must be made out by the assailant. . . . There must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. . . . We pass for convenience to a consideration of the second. . . .

To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. [The opinion went on to cite statistics on the extent of unemployment during the depression and public expenditures for relief.] The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train.

In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overlept the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of

unemployment compensation laws at the bidding of the central government. . . . Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. . . . But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. . . . Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as the states are unwilling, whether through timidity or for other motives, to do what can be done at home. . . . On the other hand fulfilment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them, are recognized hardships that government, state or national, may properly avoid. . . . If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the coöperating localities ought not in all fairness to pay a second time.

Who then is coerced through the opera-

tion of this statute? Not the taxpayer. He pays in fulfilment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. . . . We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. . . . We think the choice must stand. . . .

Fourth. The statute does not call for a surrender by the states of powers essential to their quasi-sovereign existence.

[The opinion then analyzed contentions of the appellant that the provisions of the Social Security Act respecting the approval of a state law, such as the requirement that funds must be deposited with the Unemployment Trust Fund in Washington, and that, when withdrawn, could be used only for the payment of unemployment benefits, and that paying agencies (other than public employment offices) had to be approved by the Social Security Board. Justice Cardozo held that Congress had the right to lay down reasonable safeguards to insure the effectiveness of the law. Moreover, if Alabama were displeased with these arrangements, all she had to do was repeal her law, in which event she would be restored to the position she occupied prior to the passage of the state law.]

The inference of abdication thus dissolves in thinnest air when the deposit [of the proceeds from the state tax] is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without dero-

gating from their sovereignty. . . . The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. . . . We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. . . .

In a dissenting opinion, Justice McReynolds held that the effect of the decision would be practically to annihilate the theory that the states should remain "really free to exercise governmental powers, not delegated or prohibited, without interference by the Federal Government through threats of punitive measures or offers of seductive favors." "Unquestionably our federate plan of government confronts an enlarged peril."

Justice Sutherland, for himself and Justice Van Devanter, dissented in a separate opinion. He expressed his agreement with the bulk of the majority opinion, but held that the provisions for deposit of state funds in Washington and the rules governing withdrawal of funds and paying agencies contemplated an unconstitutional surrender by the state of its "governmental power to administer its own unemployment law or the state payroll-tax funds which it has collected for the purposes of that law." Such surrender tended to upset the balance between the powers of the states and of the federal government.

A third dissent was written by Mr. Justice Butler who, in addition to approving of the objections raised by Justices McReynolds and Sutherland, held that the Act violated the Tenth Amendment. "The Constitution grants to the United States no power to pay unemployed persons or to require the States to enact laws or to raise or disburse money for that purpose. The provisions in question, if not amounting to coercion in a legal sense, are manifestly designed and intended directly to affect state action in the respects specified."

V. THE UNEMPLOYMENT-COMPENSATION SYSTEM

SIGNIFICANT PROVISIONS OF STATE UNEMPLOYMENT COMPENSATION LAWS, FEBRUARY 1, 1940¹

State and type of fund	Size of firms covered	Contribution rate for 1940 (percentage of wages)	BENEFITS					Duration in a given 52-week period ²	Total amount of benefits as a proportion of wages earned in prior period
			Month first payable	Weeks of initial waiting period	Weekly benefit rate	Maximum per week	Minimum per week		
ALABAMA: Pooled ..	Employer of 8 or more in 20 weeks; also all employers liable to Federal tax.	Employer, 2.7 per cent on wages up to \$3,000; employee, 1 per cent on wages up to \$3,000.	Jan. 1938.	3	$\frac{1}{20}$ of high quarter's wages, established by table in law.	\$15	\$2	20	$\frac{1}{3}$ in 4 quarters.
ALASKA: Pooled, experience rating.	Employer of 8 or more in 20 weeks.	Employer, 2.7 per cent.	Jan. 1939.	2	$\frac{1}{20}$ of high quarter's wages.	16	\$5	16	Do.
ARIZONA: Pooled, experience rating.	Employer of 3 or more in 20 weeks.	do	Jan. 1938.	2	50 per cent of full-time weekly wage.	15	\$5 or $\frac{3}{4}$ of full-time weekly wage.	14	$\frac{1}{6}$ in 8 to 12 quarters.
ARKANSAS: Pooled, experience rating.	Employer of 1 or more in 20 weeks.	Employer, 2.7 per cent on wages up to \$3,000.	Jan. 1939.	2	$\frac{1}{20}$ of high quarter's wages.	15	\$3	16	$\frac{1}{3}$ in 4 quarters.
CALIFORNIA: Pooled, experience rating. Exempt unemployment benefit and guaranteed employment plans.	Employer of 4 or more in 20 weeks.	Employer, 2.7 per cent on wages up to \$3,000; employee, 1 per cent on wages up to \$3,000, not to exceed 50 per cent of general employer rate.	Jan. 1938.	2	$\frac{1}{20}$ of high quarter's wages, established by table in law.	18	\$10	.....	26 to 54 per cent in 4 quarters, according to schedule of wage classes.
COLORADO: Pooled, experience rating.	Employer of 8 or more in 20 weeks; also all employers liable to Federal tax.	Employer, 2.7 per cent.	Jan. 1939.	2	$\frac{1}{20}$ of high quarter's wages.	15	\$5	16	$\frac{1}{3}$ in 4 quarters.

SIGNIFICANT PROVISIONS OF STATE UNEMPLOYMENT COMPENSATION LAWS, FEBRUARY 1, 1940 ¹ (continued)

State and type of fund	Size of firms covered	Contribution rate for 1940 (percentage of wages)	Month first payable	Weeks of initial waiting period	Weekly benefit rate	Maximum per week	Minimum per week	Duration in a given 52-week period ²	
								Maximum number times weekly benefit amount payable	Total amount of benefits as a proportion of weekly wages earned in prior period
CONNECTICUT: Pooled, experience rating.	Employer of 5 or more in 20 weeks.	... do	Jan. 1938.	2	Established by weighted table in law.	\$15	do	13	15 1/8 to 23 per cent in 4 quarters, according to schedule of wage classes.
DELAWARE: Pooled, experience rating.	Employer of 1 or more in 20 weeks; also all employers liable to Federal tax.	... do	Jan. 1939.	2	1/25 of high quarter's wages.	15	do	13	1/6 in 4 quarters.
DISTRICT OF COLUMBIA: Pooled, experience rating.	Employer of 1 or more.	Employer, 3 per cent.	Jan. 1938.	3	40 per cent of average weekly wage, plus allowance for dependents up to maximum of 65 per cent.	15	None	16 (plus additional benefits on basis of ratio of provisions)	1 week's benefit to 3 weeks of employment in past 104 weeks, plus additional benefits at 1 to 20 in past 260 weeks.
FLORIDA: Pooled, experience rating. Guaranteed employment plans.	Employer of 8 or more in 20 weeks.	Employer, 2.7 per cent on wages up to \$3,000.	Jan. 1939.	2	1/20 of high quarter's wages, established by table in law.	15	\$3	16	1/6 in 8 quarters.
GEORGIA: Pooled ..	... do	Employer, 2.7 per cent.	do ..	2	1/28 of high quarter's wage.	15	\$5 or 3/4 of full-time weekly wage.	16	1/6 in 8 to 12 quarters.
HAWAII: Pooled, experience rating.	Employer of 1 or more in 20 weeks.	Employer, 2.7 per cent.	Jan. 1939.	2	1/25 of high quarter's wages.	15	\$5	16	1/6 in 4 quarters.
IDAH0: Pooled	Employer with \$78 or more wages payable in 1 quarter.	... do	Sept. 1938.	2	Established by weighted table in law.	18	do	17	1/4 in 4 quarters.

ILLINOIS: Pooled, experience rating.	Employer of 6 or more in 20 weeks.	... do	July 1939.	2	$\frac{1}{20}$ of high quarter's wages.	16	\$7	16	Do.
INDIANA: Contributions of 0.135 per cent of employer's pay roll pooled, remainder employer reserve. Guaranteed employment accounts.	Employer of 8 or more in 20 weeks.	Employer, determined by experience rating.	Apr. 1938.	2	$\frac{1}{25}$ of high quarter's wages.	15	None. A \$5 minimum is authorized within discretion of State agency.	³ 15	16 per cent in 5 quarters. ^{3, 4}
IOWA: Pooled, experience rating.	Employer of 8 or more in 15 weeks; also all employers liable to Federal tax.	Employer, 2.7 per cent.	July 1938.	2	50 per cent of full-time weekly wage.	15	\$5 or full-time weekly wage.	15	$\frac{1}{6}$ in 8 quarters.
KANSAS: Pooled, experience rating.	Employer of 8 or more in 20 weeks.	... do	Jan. 1939.	2	$\frac{1}{25}$ of high quarter's wages.	15	\$5 or 6 per cent of high quarter's wages. ⁵	.....	16 per cent in 4 quarters.
KENTUCKY: Employer reserve; employee contributions and earnings from investment pooled.	Employer of 4 or more in 3 quarters of preceding year, to each of whom \$50 payable in each such quarter, or of 8 or more in 20 weeks.	Employer, 2.7 per cent; employee, 1 per cent on wages up to \$3,000 per employer, not to exceed 50 per cent of employer's contribution.	do.	3	$\frac{1}{28}$ of second highest quarter's wages.	15	\$4	15	$\frac{1}{6}$ in 8 to 12 quarters.
LOUISIANA: Pooled, experience rating.	Employer of 4 or more in 20 weeks or 12 or more in 10 weeks.	Employer, 2.7 per cent, employee, 0.5 per cent.	Jan. 1938.	2	50 per cent of full-time weekly wage.	18	....do	18	Do.
MAINE: Pooled	Employer of 8 or more in 20 weeks; also all employers liable to Federal tax.	Employer, 2.7 per cent.	do.	2	Based on schedule of annual wages.	15	\$3	16 (uniform duration)	Uniform duration.
MARYLAND: Pooled.	Employer of 4 or more in 20 weeks.	... do	do.	2	$\frac{1}{26}$ of high quarter's wages, established by table in law.	15	\$5	16	$\frac{1}{4}$ in 4 quarters.
MASSACHUSETTS: Pooled, experience rating.	Employer of 4 or more in 20 weeks; also all employers liable to Federal tax.	Employer, 2.7 per cent on wages up to \$3,000.	do.	2	$\frac{1}{26}$ of high quarter's wages. ⁶	15	....do. ⁷ ...	(⁸)	12 $\frac{1}{2}$ per cent in 7 quarters. ⁸

SIGNIFICANT PROVISIONS OF STATE UNEMPLOYMENT COMPENSATION LAWS, FEBRUARY 1, 1940¹ (continued)

State and type of fund	Size of firms covered	Contribution rate for 1940 (percentage of wages)	Month first payable	Weeks of initial waiting period	Weekly benefit rate	Maximum per week	Minimum per week	Duration in a given 52-week period ²	
								Maximum number times weekly benefit amount payable	Total amount of benefits as a proportion of wages earned in prior period
MICHIGAN: Pooled, experience rating.	Employer of 8 or more in 20 weeks; also all employers liable to Federal tax.	Employer, 3 per cent on wages up to \$3,000.	July 1938.	2	$\frac{1}{25}$ of high quarter's wages.	\$16	\$7, if high quarter's wages \$100-\$175; \$6, if less than \$100.	16	$\frac{1}{4}$ in 4 quarters. ⁹
MINNESOTA: Pooled, experience rating.	Employer of 1 or more in 20 weeks and of 8 or more outside cities with population of 10,000 or more.	Employer, 2.7 per cent.	Jan. 1938.	2	.. do	15	\$5	16	$\frac{1}{4}$ in 4 quarters.
MISSISSIPPI: Pooled.	Employer of 8 or more in 20 weeks.	....do	Apr. 1938.	2	$\frac{1}{25}$ of high quarter's wages.	15	None	14	$\frac{1}{4}$ in 8 to 12 quarters.
MISSOURI: Pooled, experience rating.	....do .....	....do	Jan. 1939.	3	$\frac{1}{25}$ of high quarter's wages.	15	\$5 or 6 per cent of high quarter's wages.	12	16 per cent in 8 to 12 quarters.
MONTANA: Pooled.	Employer of 1 or more in 20 weeks, if year's pay roll over \$500.	....do	July 1939.	2	....do	15	\$5	16 (uniform duration)	Uniform duration.
NEBRASKA: Employer reserve; earnings in pooled account.	Employer of 8 or more in 20 weeks.	Employer, determined by experience rating. Contributions are on wages up to \$5,000.	Jan. 1939.	2	50 per cent of full-time weekly wage.	15	\$5	16	$\frac{1}{4}$ in 4 quarters.
NEVADA: Pooled, experience rating.	Employer with \$225 or more wages payable in 1 quarter.	Employer, 2.7 per cent.	.. do ..	2	$\frac{1}{20}$ of high quarter's wages.	15	....do	18	Do.

NEW HAMPSHIRE: Pooled, experience rating.	Employer of 4 or more in 20 weeks, also all employers liable to Federal tax.	Employer, 2.7 per cent on wages up to \$3,000.	Jan. 1938.	2	$\frac{1}{2}$ of high quarter's wages.	15	....do	16	$\frac{1}{2}$ in 4 quarters.
NEW JERSEY: Pooled, experience rating.	Employer of 8 or more in 20 weeks.	Employer, 2.7 per cent on wages up to \$3,000; employee, 1 per cent on wages up to \$3,000 per employee.	Jan. 1939.	2	....do	15	....do	16	Do.
NEW MEXICO: Pooled, experience rating.	Employer with \$450 or more wages payable in 1 quarter, or employer of 2 or more in 13 weeks.	Employer, 2.7 per cent.	Dec. 1938.	2	$\frac{1}{2}$ of high quarter's wages, established by table in law.	15	\$3	16	$\frac{1}{2}$ in 4 quarters.
NEW YORK: Pooled.	Employer of 4 or more in 15 days.	Employer, 3 per cent on wages up to \$3,000; but for employers subject to title IX tax, not more than 2.7 per cent of such wages.	Jan. 1938.	3	$\frac{1}{2}$ of high quarter's wages, established by table in law.	15	\$7	13 (uniform duration)	Uniform duration.
NORTH CAROLINA: $\frac{3}{4}$ of contributions to employer reserve; remainder pooled.	Employer of 8 or more in 20 weeks.	Employer, 2.7 per cent.	...do..	2	Based on schedule of annual wages.	15	\$1.50	16 (uniform duration)	Do.
NORTH DAKOTA: Pooled, experience rating.	....do	do	Jan. 1939.	2	50 per cent of full-time weekly wage.	15	\$5	16	$\frac{1}{2}$ in 4 quarters.
OHIO: Pooled, experience rating.	Employer of 3 or more at any one time.	Employer, 2.7 per cent on wages up to \$3,000.	...do..	3	50 per cent of average weekly wage.	15	None	16 (within any 12 months, uniform duration)	Uniform duration.
OKLAHOMA: Pooled, experience rating.	Employer of 8 or more in 20 weeks.	Employer, 2.7 per cent.	Dec. 1938.	2	50 per cent of full-time weekly wage.	15	\$8 or $\frac{3}{4}$ of full-time weekly wage.	16	$\frac{1}{2}$ in 4 quarters.
OREGON: Pooled, experience rating.	Employer of 4 or more in any 1 day in any calendar quarter with pay roll of \$500.	Employer, 2.7 per cent on wages up to \$3,000.	Jan. 1938.	3	$\frac{1}{2}$ of high quarter's wages.	15	\$7	16	Do.

SIGNIFICANT PROVISIONS OF STATE UNEMPLOYMENT COMPENSATION LAWS, FEBRUARY 1, 1940 ¹ (continued)

State and type of fund	Size of firms covered	Contribution rate for 1940 (percentage of wages)	BENEFITS					Duration in a given 52-week period ²	
			Month first payable	Weeks of initial waiting period	Weekly benefit rate	Maximum per week	Minimum per week	Maximum number times benefit amount payable	Total amount of benefits as a proportion of weekly wages earned in prior period
PENNSYLVANIA: Pooled.	Employer of 1 or more in 20 weeks.	Employer, 2.7 per cent.	... do .	3	50 per cent of full-time weekly wage.	\$15	\$7.50	13	1/6 in 8 quarters.
RHODE ISLAND: Pooled.	Employer of 4 or more in 20 weeks; also all employers liable to Federal tax.	Employer, 2.7 per cent; employee, 1.5 per cent on wages up to \$3,000.	Jan. 1938.	2	Established by weighted table in law.	16	\$6	.....	18 to 30 per cent in 4 quarters, according to schedule of wage classes.
SOUTH CAROLINA: Pooled, experience rating.	Employer of 8 or more in 20 weeks.	Employer, 2.7 per cent on wages up to \$3,000.	July 1938.	2	1/8 of high quarter's wages established by table in law.	15	\$3	16 (uniform duration)	Uniform duration.
SOUTH DAKOTA: % employer reserve, remainder pooled.	Employer of 8 or more in 20 weeks; also all employers liable to Federal tax.	Employer, determined by experience rating. Contributions are on wages up to \$3,000.	Jan. 1939.	3	Based on schedule of annual wages.	15	....do	14 (uniform duration)	Do.
TENNESSEE: Pooled, experience rating.	Employer of 8 or more in 20 weeks.	Employer, 2.7 per cent.	Jan. 1938.	2	1/8 of high quarter's wages, established by table in law.	15	\$4	16 (uniform duration)	Do.
TEXAS: Pooled, experience rating.	....do	....do	. do .	1	1/3 of high quarter's wages (for 2-week period).	30 (for 2-week period)	\$10 (for 2-week period).	8 times benefit (for 2-week period)	1/6 in 4 quarters.
UTAH: Pooled, experience rating.	Employer with \$140 or more wages payable in 1 quarter.	....do	....do..	2	1/4 of high quarter's wages.	16	\$5	16	Do.

VERMONT: Employer's contribution over 0.54 per cent to employer's reserve; remainder pooled.	Employer of 8 or more in 20 weeks; also all employers liable to Federal tax.	Employer, 2.7 per cent on wages up to \$3,000.	.. do .	3	50 per cent of full-time weekly wage.	15	\$5 or 3/4 of full-time weekly wage.	14	1/4 in 4 quarters.
VIRGINIA: Pooled.	Employer of 8 or more in 20 weeks.	Employer, 2.7 per cent.	.. do .	2	....do	15	\$3	16	1/4 in 8 quarters.
WASHINGTON: Pooled.	... do	Employer, 2.7 per cent on wages up to \$3,000.	Jan. 1939.	2	1/40 of high quarter's wages.	15	\$7	16	1/4 in 4 quarters.
WEST VIRGINIA: Pooled, experience rating.	... do	Employer, 2.7 per cent.	Jan. 1938.	3	Based on schedule of annual wages.	15	\$3	14 (uniform duration)	Uniform duration.
WISCONSIN: Employer reserve; earnings pooled. Exempt plans for governmental units. ¹⁰	Employer of 6 or more in 18 weeks.	Employer, determined by experience rating. Contributions are on wages up to \$3,000 (except when employer contributes more than 2.7 per cent).	July 1936.	2	50 per cent of average weekly wage.	15	\$6, except for individual whose currently applicable benefit rate is \$5.11	.....	From any one employer's account, 1 week's benefit to each 4 weeks of employment with in 52 weeks preceding close of employment. ¹²
WYOMING: Pooled, experience rating.	Employer of 1 or more in 20 weeks, and with \$150 or more wages payable in 1 quarter.	Employer, 2.7 per cent.	Jan. 1939.	2	1/40 of high quarter's wages.	18	\$5	14	1/4 in 4 quarters.

¹ Source: Social Security Board.

² Payable in any "benefit period."

³ But benefits are paid at the rate of \$5 per week until benefit rights are exhausted, even though the computed minimum is less than \$5.

⁴ Effective March 31, 1940, based on weighted table in law.

⁵ Effective April 1, 1940, the lesser of 20 weeks or 30 per cent of wages earned in 4 quarters.

⁶ Lesser of \$200 or 30 per cent of base period wages if such wages are less than \$800.

⁷ Effective April 1, 1940, provision for exempt plans for governmental units is repealed.

⁸ Effective for employers newly liable after December 31, 1939, and for all employers April 1, 1940, 1 week's benefit to 3 weeks of such employment.

⁹ After April 1, 1940, minimum is \$6 in all cases.

¹⁰ Effective April 1, 1940, 1 week's benefit to 3 weeks of such employment.

¹¹ Effective April 1, 1940, 1 week's benefit to 3 weeks of such employment.

¹² Effective April 1, 1940, \$6.

VI. THE REGULATION OF PRIVATE EMPLOYMENT AGENCIES

To the extent that unemployment is a result of the maladjustment of the labor market with a surplus of workers in one place and a surplus of jobs in another, the remedy lies in the development of an efficient mechanism to bring the workers and the jobs together. It is mainly for this reason that much stress has been laid in recent years on the development of an effective job placement service as an integral part of an unemployment compensation program. If workers and jobs can be brought together, unemployment will be reduced and the strain on the unemployment funds lessened. This does not, of course, mean that even the most perfectly functioning employment service will eliminate unemployment, but rather that it will tend to eliminate that portion of the total of unemployment which is attributable to the ignorance of workers concerning the whereabouts of jobs and the ignorance of employers concerning the whereabouts of workers.

While this is currently the major emphasis in the field of employment service, it is not the only one, and, formerly, it was less important than certain other aspects. Many evils have been attributed to private employment agencies, and legislation to correct those evils has been enacted in many states. There are thus two distinct phases of public interest in employment agencies: (1) the elimination of evils said to be common in private employment agencies, and (2) the development of more effective placement as part of an attack on unemployment.

One of the reasons given for the establishment of public employment agencies is the alleged abuses practiced by many of the private agencies. Some of the more common of the fraudu-

lent methods were enumerated by the United States Bureau of Labor in 1912 as follows:

1. Charging a fee and failing to make any effort to find work for the applicant.
2. Sending applicants where no work exists.
3. Sending applicants to distant points where no work or where unsatisfactory work exists, but whence the applicant will not return on account of the expense involved.
4. Collusion between the agent and the employer, whereby the applicant is given a few days' work and then discharged to make way for new workmen, the agent and employer dividing the fee.
5. Charging exorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc.
6. Inducing workers, particularly girls, who have been placed, to leave, pay another fee, and get a "better job."¹

In consequence of these alleged abuses, most states have passed laws regulating employment agencies. These laws may require the posting of a large bond, may prohibit the use of saloons, etc., as employment offices, provide for the return of fees if no work is secured, make illegal the practice of sending women and minors to immoral establishments, etc. The courts have generally upheld the regulation of employment agencies by the states, but have declared unconstitutional statutes which virtually abolish private employment agencies or which regulate the fees to be charged by such agencies.

¹ *Laws Relating to Employment Agencies in the United States as of July 1, 1937*. U. S. Bureau of Labor Statistics, Bulletin No. 630 (Washington: Government Printing Office, 1937), pp. 6-7. See also dissenting opinion by Mr. Justice Brandeis in *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336 (1917).—E.S.

BRAZEE *v.* MICHIGAN

Supreme Court of the United States. 1916.
241 U. S. 340; 36 Sup. Ct. 561; 60 L. Ed. 1034.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Brazee having taken out a license to conduct an employment agency in De-

troit under Act 301, Public Acts of Michigan, 1913, was thereafter convicted of violating its provisions by sending one seeking employment to an employer who

had not applied for help. He claimed the statute was invalid upon its face because in conflict with both state and Federal Constitutions, and lost in both trial and Supreme Courts. 183 Michigan 259. Now he insists it offends that portion of the Fourteenth Amendment which declares, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The general purpose of the act is well expressed in its title—"An Act to provide for the licensing, bonding and regulation of private employment agencies, the limiting of the amount of the fee charged by such agencies, the refunding of such fees in certain cases, the imposing of obligations on persons, firms or corporations which have induced workmen to travel in the hope of securing employment, charging the Commissioner of Labor with the enforcement of this act and empowering him to make rules and regulations, and fixing penalties for the violation hereof." It provides: Sec. 1. No private employment agency shall operate without a license from the Commissioner of Labor, the fee for which is fixed at \$25 per annum except in cities over two hundred thousand population, where it is \$100; this license may be revoked for cause; the Commissioner is charged with the enforcement of the act and given power to make necessary rules and regulations. Sec. 2. A surety bond in the penal sum of one thousand dollars shall be furnished by each applicant. Sec. 3. Every agency shall keep a register of its patrons and transactions. Sec. 4. Receipts containing full information regarding the transactions shall be issued to all persons seeking employment who have paid fees. Sec. 5. "The entire fee or fees for the procuring of one situation or job and for all expenses, in-

cidental thereto, to be received by any employment agency, from any applicant for employment at any time, whether for registration or other purposes, shall not exceed ten per cent of the first month's wages;" no registration fee shall exceed one dollar and in certain contingencies one-half of this must be returned. Sec. 6. "No employment agent or agency shall send an applicant for employment to an employer who has not applied to such agent or agency for help or labor;" nor fraudulently deceive any applicant for help, etc. Sec. 7. No agency shall direct any applicant to an immoral resort or be conducted where intoxicating liquors are sold. Sec. 8. Violations of the act are declared to be misdemeanors and punishment is prescribed.

The Supreme Court of Michigan held "the business is one properly subject to police regulation and control;" the prescribed license fee is not excessive; provisions of the state constitution in respect of local legislation are not infringed; and no arbitrary powers judicial in character are conferred on the Commissioner of Labor. But it did not specifically rule concerning the validity of limitations upon charges for services specified by §5.

Considering our former opinions it seems clear that without violating the Federal Constitution a State, exercising its police power, may require licenses for employment agencies and prescribe reasonable regulations in respect of them to be enforced according to the legal discretion of a commissioner. The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the legislature can properly protect them. . . . In its general scope and so far as now sought to be enforced against plaintiff in error the act in question infringes no provision of the Federal Constitution. The charge relates only to the plainly mischievous action denounced by §6. Provisions of §5 in respect of fees to be demanded or retained

are severable from other portions of the act and, we think, might be eliminated without destroying it. Their validity was not passed upon by the Supreme Court of

the State and has not been considered by us.

The judgment of the court below is
Affirmed.

ADAMS *v.* TANNER

Supreme Court of the United States. 1917.
244 U. S. 590; 37 Sup. Ct. 662; 61 L. Ed. 1336.

A law of the state of Washington, while not abolishing private employment agencies, forbade such agencies to collect fees from workers. Since thus their major, if not their only, source of income would be cut off, private agencies would almost necessarily have to go out of business. The constitutionality of the statute was challenged.

* * *

MR. JUSTICE McREYNOLDS delivered the opinion of the court. . . .

We have held employment agencies are subject to police regulation and control. . . . But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand. . . .

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough

to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked. . . .

We are of opinion that [the law] . . . is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the 14th Amendment, to engage in a useful business. It may not therefore be enforced against them. . . .

RIBNIK *v.* McBRIDE

Supreme Court of the United States. 1928.
277 U. S. 350; 48 Sup. Ct. 545; 72 L. Ed. 913.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Chapter 227, Laws of New Jersey, 1918, p. 822 being an act to regulate the keeping of employment agencies, requires that every person operating an employment agency as defined by the statute must procure a license from the Commissioner of Labor. A penalty is imposed for failure to do so. The application for such license

must be made in writing to the Commissioner of Labor and, among other requirements, the applicant must "file with the Commissioner of Labor, for his approval, a schedule of fees proposed to be charged for any services rendered to employers seeking employees, and persons seeking employment, and all charges must conform thereto. The schedule of fees may be changed only with the ap-

proval of the Commissioner of Labor." The Commissioner of Labor may refuse to issue or may revoke any license for any good cause shown within the meaning and purpose of the act.

Plaintiff in error filed with the state Commissioner of Labor a written application for a license to conduct an employment agency. All conditions of the statute were complied with; but the commissioner rejected the application upon the sole ground that, in his opinion, the fees proposed to be charged in respect of certain permanent positions were excessive and unreasonable. This action of the commissioner was brought up for review to the supreme court of the state, and that court construing the statute as empowering the commissioner to fix and limit the charges to be made by the applicant, nevertheless sustained it as constitutional under the due process of law clause of the Fourteenth Amendment. . . .

That the state has power to require a license and regulate the business of an employment agent does not admit of doubt. But the question here presented is whether the due process of law clause is contravened by the legislation attempting to confer upon the Commissioner of Labor power to fix the prices which the employment agent shall charge for his services. . . . Has the business in question been devoted to the public use and an interest in effect granted to the public in that use? Or, in other words, is the business one "affected with a public interest," within the meaning of that phrase as heretofore defined by this Court? . . .

The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate broker, ship

broker, merchandise broker or ticket broker. In the *Tyson* case . . . we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket broker, and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld.

An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that "public interest" which the law contemplates as the basis for legislative price control. . . . Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency . . . the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place. . . .

To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already

fully considered by this Court. These are grounds for regulation but not for price fixing, as we have already definitely decided. . . .

MR. JUSTICE STONE, dissenting. . . .

Under the decisions of this Court not all price regulation, as distinguished from other forms of regulation, is forbidden. As those decisions have been explained, price regulation is within the constitutional power of a state legislature when the business concerned is "affected with a public interest." That phrase is not to be found in the Constitution. Concededly it is incapable of any precise definition. It has and can have only such meaning as may be given to it by the decisions of this Court. As I read those decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative forces of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole. . . . The price regulation may embrace businesses "which though not public in their inception may fairly be said to have risen to be such and have become subject in consequence to some governmental regulation." . . . The use by the public generally of the specific thing or business affected is not the test. The nature of the service rendered, the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation, are elements to be considered in determining whether the "public interest" exists. . . . The economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient to give rise to the "public interest" and to justify the regulation of contracts with its members . . . and obviously circumstances may so change in point of time or so differ in space as to clothe a business with such an interest which at other times

or in other places would be a matter purely of private concern. . . .

I cannot say *a priori* that the business of employment agencies in New Jersey lacks the requisite "public interest." We are judicially aware that the problem of unemployment is of grave public concern; that the conduct of the employment agency business bears an important relationship to that larger problem and affects vitally the lives of great numbers of the population, not only in New Jersey but throughout the United States; that employment agencies, admittedly subject to regulation in other respects . . . and in fact very generally regulated, deal with a necessitous class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer. We are not judicially ignorant of what all human experience teaches, that those so situated are peculiarly the prey of the unscrupulous and designing. . . .

For thirty years or more the evils found to be connected with the business of employment agencies in the United States have been the subject of repeated investigations, official and unofficial, and of extensive public comment. They have been the primary reason for the establishment of public employment offices in the various States.

Quite apart from the other evils laid at the door of the private agencies, the data supplied by these investigations and reports afford a substantial basis for the conclusion of the New Jersey legislature that the business is peculiarly subject to abuses relating to fee-charging, and that for the correction of these the restriction to a reasonable maximum charge is the only effective remedy. These data . . . may be briefly summarized as follows:

First. They show that the agencies, left to themselves, very generally charge extortionate fees. . . .

Second. These data show that the fees charged are often discriminatory. It is made known in slack season that but few jobs are available and that to these will be referred the applicants who tender the larger "extra fees" or "presents." . . .

Third. Fee-splitting has been a recurrent subject of complaint. . . .

Fourth. It is reported that at times of widespread unemployment the private agencies are known to raise their fees out of all proportion to the reasonable value of their services. . . .

Fifth. Finally, it is pointed out that the private agencies charge the employee and do not charge the employer for a service that is rendered to both. The convenience of being furnished with employees is similar to that of being directed to a position; but less effort is required to collect compensation for the whole service from the employee alone. . . .

Legislation for the correction of these and other evils has been general throughout the United States. Among the earliest comprehensive schemes for that purpose was the Act of June 19, 1906, c. 3438, 34 Stat. 304, adopted by Congress for the District of Columbia. . . .

Among the states, twenty-one have limited the total fees that may be charged, ten by fixing a stated maximum, and eleven by restricting the charge to a named per-

centage of the salary earned during some period. . . .

I cannot accept as valid the distinction on which the opinion of the majority seems to me necessarily to depend, that granted constitutional power to regulate there is any controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property. . . .

To say that there is constitutional power to regulate a business or a particular use of property because of the public interest in the welfare of a class peculiarly affected, and to deny such power to regulate prices for the accomplishment of the same end, when that alone appears to be an appropriate and effective remedy, it is to make a distinction based on no real economic difference, and for which I can find no warrant in the Constitution itself nor any justification in the opinions of this Court. . . .

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this dissent.¹

¹ On April 28, 1941, the *Ribnik* ruling was reversed by the United States Supreme Court in *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, Inc.* In upholding a Nebraska law fixing maximum charges of employment agencies, Mr. Justice Douglas remarked, "The drift away from *Ribnik v. McBride*, *supra*, has been so great that it can no longer be deemed a controlling authority."

VII. PUBLIC EMPLOYMENT AGENCIES

THE GROWTH OF A FEDERAL-STATE SYSTEM¹

Public employment agencies, sometimes designated free public employment offices, are agencies supported by a public body—State, county, city, town, or village. Such agencies are primarily established for the purpose of furnishing employment to workers and labor to employers.

The first free public employment office

¹ *Laws Relating to Employment Agencies in the United States, op. cit.*, pp. 1-4.—E.S.

in the United States was a municipal agency established in 1890 at Cleveland, Ohio. Later the idea became a definite movement which was taken up by various States, through their legislative bodies. The movement spread until at the present time the majority of the States have provided for the establishment of public employment offices. The growth of these institutions in the United States may be

attributed in part to the alleged abuses which have grown up around private agencies. At the same time social utility and economic developments, as well as the belief that obtaining employment for the unemployed is a proper exercise of public authority, have played a powerful and important part in the establishment of public employment agencies.

As established, however, not all these agencies were functioning units. While enabling acts were adopted, some of the States made no appropriations for the maintenance of an up-to-date, efficient organization, and as a result the work of seeking to bring about contacts between the "jobless man" and the "manless job" has been seriously handicapped. With the adoption of Federal-State cooperative relations in the maintenance and operation of State employment offices under the Federal act of 1933, public employment agencies in the United States entered a new stage of development.

The principle of impartial administration was enunciated when the Supreme Court of Illinois,² as early as 1903, declared that whenever the public undertakes to conduct an employment office the services rendered must be without discrimination. An act of the Illinois legislature (acts of 1899, p. 268), which the court declared unconstitutional, forbade public employment agencies to furnish names of applicants for work to employers whose workmen were on strike. Two discriminations were pointed out by the court, one against employers whose employees were on strike, and the other against workmen seeking employment who were willing to accept service where workmen had gone out as strikers. The court said that an unwarrantable distinction was drawn "between workmen who apply for situations to employers where there is no strike or lock-out and workmen who do not so apply and * * *

tween employers who may have the misfortune to be the victims of a strike or lock-out and employers who do not have such misfortune."

Section 8 of the law under consideration, the court said, did not "relate to persons and things as a class or to all employers, but only to those who have not been the victims of strikes or lock-outs." As was said earlier in the case of *Gillespie v. People* (188 Ill. 176, 58 N. E. 1007), "where a statute does this—where it does not relate to persons or things as a class, but to particular persons or things of a class—it is a special, as distinguished from a general, law."

The Federal Government entered the field of public employment service in 1907. By an act of the Congress of that year (34 U. S. Stat. L. 898) a division of information in the Bureau of Immigration and Naturalization (Department of Commerce and Labor) was established. Section 40 of the act provided that: "It shall be the duty of said division to promote a beneficial distribution of aliens admitted into the United States among the several States and Territories desiring immigration."

In 1913, when the Department of Labor was created as a separate executive department, the division of information of the Bureau of Immigration was transferred to it. The scope of the work was enlarged to correspond with the broad powers of the Department of Labor, as stated in the organic act: "The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment."

The Federal Labor Service was organized in 1915, and was engaged mostly in the distribution of farm labor. The service was expanded during the World War, but its activities were reduced during the

² *Mathews v. People*, 202 Ill. 389, 67 N. E. 28.

years immediately following. Except for the farm labor division, the principal function of the Service consisted of cooperation with the State and municipal employment agencies. In January 1918, the Service was taken from the Bureau of Immigration and set up as a separate agency in the United States Department of Labor. Subsequent attempts were made to place the employment service on a more permanent and substantial basis.

At the Seventy-first Congress (1931), a bill creating a cooperative national employment system was passed by both the House and Senate only to meet a presidential veto. Later in the same session, however, the Department of Labor (46 U. S. Stat. L. 1575) was granted an appropriation of \$500,000 for its Employment Service. As a result of the appropriation thus obtained an enlarged Federal Employment Service was established at once with offices in every State of the Union. This system continued until it was abolished early in 1933.

Shortly afterwards, on June 6, 1933, a national employment system was established by an act (48 Stat. L. 113) passed at the special session of the Seventy-third Congress.

This law created a United States Employment Service in the Department of Labor and supplanted a former Federal employment service, with offices in every State, conducted independently of the State employment service.

The new law established a national employment system in cooperation with the various States, including the Territories of Hawaii and Alaska. An appropriation of \$1,500,000 was provided for the fiscal year ending June 30, 1934, and \$4,000,000 for each fiscal year thereafter, up to and including the fiscal year ending June 30, 1938. Thereafter the amount of the appropriation is to be determined by the Congress, as may be deemed necessary.

In order to obtain the benefits of any appropriations, a State must accept the

provisions of the national act and designate a State agency with necessary powers to cooperate with the United States Employment Service. Seventy-five per cent of the amounts appropriated are to be apportioned by the director among the several States in the proportion which their population bears to the total population of the United States. No payment shall be made to any State until an equal amount has been appropriated and made available for that year by the State. By an act of May 10, 1935, it was provided that in the apportionment of the amount, at least \$10,000 must be granted to each State.

The United States Employment Service is charged with the duty of promoting and developing a national system of employment offices for men, women, and juniors "who are legally qualified to engage in gainful occupations"; to maintain a veterans' bureau, a farm placement service, and a public employment service for the District of Columbia; and to assist in establishing public employment offices in the several States and political subdivisions thereof in which there shall be located a veterans' employment service. The Federal agency is charged also with the duty to "assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States."

The law provides for the appointment of a Federal Advisory Council. This board is to be composed of representatives of employers and employees and the public for the purpose of formulating policies and the determining of problems relating to employment. The Federal director is

required to form State advisory councils, similarly organized.

Before any applicant is referred to a place for employment, notice of any strikes or lock-outs must be given.

All States desiring to receive benefits under the act must submit detailed plans to the director, and must also make such reports concerning any operations and expenditures of money as the director may require. The franking privilege for free

transmission of official mail matter is extended to the United States Employment Service and to all State employment systems operating under the provisions of the act.

The law was subsequently amended. All the States have now accepted the act, thereby making possible a well-integrated Federal-State system of public employment offices.

CHAPTER TWELVE

OLD-AGE ASSISTANCE AND BENEFITS

Just as the depression which began in 1929 helped prepare the way for unemployment compensation by demonstrating dramatically the serious plight of workers during depressions, so it contributed greatly to the passage of laws providing for pensions and benefits to the dependent aged. The dependency of many old people had long been known, and,

as we shall see, tentative steps were taken by a few states during the 1920's to make financial provision for those old people who were in need. It was not until the full force of the depression had been felt, however, that serious consideration was given to the necessity for a comprehensive approach to the problem of the dependent aged.

I. THE PROBLEM OF INCOME FOR OLD AGE INDUSTRIAL OLD AGE ¹

Much has been written on the employment difficulties of the older worker, yet no comprehensive or authoritative data are available for the country as a whole. Definitions of the age limit which divides the "younger" from the "older" worker are lacking, and conditions which determine the relative advantages of youth and vitality over maturity and experience must obviously vary with different types of occupation as well as with sex. The problem of the older worker is not of recent origin, though it has undoubtedly been intensified by the severity of the depression. Ever since the beginning of the industrial revolution the dynamics of a machine civilization have necessitated constant employment adjustments for all workers. Mechanization has placed an increasing emphasis upon youth, physical strength, and ability to stand nervous strain. Over the past century it has been increasingly difficult for all workers to maintain their skill, their employment, and their security. The burden of unemployment has fallen with great severity on

"older" workers—individuals whose obligations, training, and capabilities in general cannot keep pace with the speed demands of modern industry. The older-worker problem is most acute in those industrial and manufacturing processes where age entails a physical liability rather than an experience asset.

Surveys of hiring-age policies in specific localities help to throw some light on the nature and extent of the employment difficulties of the older worker. Age distributions of persons in receipt of unemployment relief as well as of those registered for work at employment offices give further evidence of the handicaps of middle or advanced age. And the unemployment census of 1930 reveals significant data on the qualitative and quantitative aspects of the problem. Thus, despite the lack of comprehensive, direct data, certain broad conclusions can be drawn for the United States as a whole.

The general conviction that the older worker finds difficulty in either obtaining or keeping employment, and that his problem is a growing one, is supported by findings of several official investigations,

¹ *Social Security in America* (Washington: Government Printing Office, 1937), pp. 143-148.—E.S.

such as those made in New York, California, and Maryland. Although such graphic phrases as "old at 40" and "the scrap heap at 45" suggest an exaggeration of the facts, there is undeniable evidence of the progressive use of maximum hiring-age limits in industry. These limits automatically cut off employment opportunities of men who find themselves competing in the labor market in middle life. There seems to be no proof of a general policy of dismissal of older workers. . . . In all cases the older man is far less apt than the younger man to secure new employment.

Both the Maryland and California surveys of age distribution in their local industries indicated that, beginning with the age distribution 40-44 years, there is a tendency toward lessened employment for wage earners in mechanical and manufacturing industries and in retail trade. With each 5-year age group after 40 years, the ratio in each employment group is less than that in the corresponding population age group.

Surveys of the unemployed in Philadelphia indicate that age is an increasingly important characteristic in the employability of unemployed workers. Among employment office applicants, 34.5 per cent of the men and 23.6 per cent of the women were over 40 years of age. In a sample survey of the unemployed, a larger proportion of men (39 per cent) but a smaller proportion of women were over 40. Among employable persons on relief, a large percentage of both sexes (39.2 per cent for men and 25.3 for women) were over 40 years of age. This cumulation of older unemployed workers on the rolls of the employment and relief offices in Philadelphia is paralleled in other cities. When data for relief and non-relief applicants in five reemployment and three State employment offices in Pennsylvania are separated, a higher proportion of older workers is found on relief rolls than among nonrelief employ-

ment office applicants throughout the State.

Age is, next to occupation, the most important factor of economic significance in the employment or unemployment situation of the individual. The squeeze which has occurred in the upper and lower hiring-age limits has brought the mass of the working population within the ages of 20 and 40. Forty years may therefore be taken as a convenient line of division for measuring the relative employability of the registrants at employment offices. In 10 counties in Pennsylvania and 2 in New York, the proportion of women over 40 years of age ranged from slightly less than one-fifth to one-fourth of the total number of women registered for work. Among men applicants in these counties the proportion over 40 years old ranged from 30 to 38 per cent. When registrants on relief are separated from the self-sustaining unemployed, higher proportions in the age groups over 40 are found for both sexes among the work applicants in the relief as compared with the nonrelief families. . . .

The depression quickly increased the quantitative dimensions of the problem. The unemployment census of 1930 showed that the rate of unemployment among males began to rise most significantly in the older age groups, beginning with 40 to 44 years.

Even in 1930 it was evident that older workers were bearing the heaviest burden in terms of duration of unemployment. It is believed that a census of unemployment at the present time would reveal a greater incidence of unemployment among middle-aged and older workers. . . .

Once unemployed, older workers tend to have great difficulty in finding reemployment and their chances of reabsorption become less and less with advancing age. Analysis of relief figures shows that older employable persons remain on relief rolls longer and experience longer "relief" periods between jobs than do

younger workers. The percentage of persons that had been unemployed for long periods of time was progressively larger with each group beyond the age of 44. . . .

The same general conclusions are reached by an analysis of census data. Beginning with the age group 40 to 45 the ratio of employed persons to the estimated total number of wage earners and salaried employees other than principal officers is progressively smaller in each successive 5-year age group than the corresponding ratio of the age group to the general population.

With the enormous shrinkage in employment brought about by the recent severe depression, it is clear that large

groups of normally secure, competent older workers have been discharged. The small shop and business, moreover, which formerly absorbed a considerable percentage of older workers, who dropped out of more strenuous industrial pursuits, are becoming less and less prevalent. This trend reduces the economic opportunities previously open to men and women after their peak of physical activity was passed. As a result of these industrial trends, what may be described as "economic old age"—i. e., permanent inactivity and consequent cessation of earnings—begins in many cases early in middle life, often antedating by a considerable number of years the period of physiological old age.

ECONOMIC DEPENDENCY IN OLD AGE ¹

The conditions of modern society, especially in highly urbanized and industrial areas, do not permit the wage earner, unaided, to provide for his old age. Unless wages are increased, thrift encouraged, and savings safeguarded by the government, the community as a whole will inevitably have to meet an increasing problem in the care of the dependent aged. A man's productive, wage-earning period is rarely more than 45 years. Under present conditions he must earn enough in this period to contribute toward the support of aged parents, rear and educate children, maintain his family at a standard of living more or less consistent with American ideals, and save enough in the form of insurance or absolutely safe investment to provide a modest income until death, if he survives his working period. This last item in the budget is the one least urgent, least stressed by advertising propaganda, and most easily disregarded among the many financial demands.

* * * *

No even reasonably complete data is available regarding the means of support of aged persons, and the number in receipt of some form of public charity is not definitely known. The last almshouse survey was made more than 10 years ago, and the number of people in institutions of this kind can only be approximated. There are about 700,000 people over 65 years of age on F. E. R. A. relief lists, and the present cost of the relief extended to these people has been roughly estimated at \$45,000,000 per year. In addition there are a not definitely known but large number of old people in receipt of relief who are not on F. E. R. A. relief lists. All told, the number of old people now in receipt of public charity is probably in excess of 1,000,000.

The number in receipt of some form of pension is much smaller. Approximately 180,000 old people, most of them over 70 years of age, are receiving pensions under the State old-age assistance laws, the average pension last year being \$19.74 per month.

A somewhat smaller number of the aged are receiving public retirement or

¹ *Social Security in America*, p. 138; and *Report of the Committee on Economic Security*, printed in *Hearings on H. R. 4120*, 74th Congress, 1st Session (Washington: Government Printing Office, 1935), pp. 38-39.—E.S.

veterans' pensions, for which the expenditures exceed those under the general old-age assistance laws. Approximately 150,000 aged people are in receipt of industrial and trade-union pensions, the cost of which exceeds \$100,000,000 per year.

The number of the aged without means of self-support is much larger than the number receiving pensions or public assistance in any form. Upon this point the available data is confined to surveys made in a few States, most of them quite a few years ago. Connecticut (1932) and New York (1929) found that nearly 50 per cent of their aged population (65 years of age and over) had an income of less than \$25 per month; 34 per cent in Connecticut had no income whatsoever. At this time a conservative estimate is that at least one-half of the approximately 7,500,000 people over 65 years now living are dependent.

Children, friends, and relatives have borne and still carry the major part of the cost of supporting the aged. Several of the State surveys have disclosed that from 30 to 50 per cent of the people over 65 years of age were being supported in this way. During the present depression, this burden has become unbearable for many of the children, with the result that the number of old people dependent upon public or private charity has greatly increased.

The depression will inevitably increase the old-age problem of the next decades.

Many children who previously supported their parents have been compelled to cease doing so, and the great majority will probably never resume this load. The depression has largely wiped out wage earners' savings and has deprived millions of workers past middle age of their jobs, with but uncertain prospects of ever again returning to steady employment. For years there has been some tendency towards a decrease in the percentage of old people gainfully employed. Employment difficulties for middle-aged and older workers have been increasing, and there is little possibility that there will be a reversal of this trend in the near future.

Men who reach 65 still have on the average 11 or 12 years of life before them; women, 15 years. A man of 65 to provide an income of \$25 per month for the rest of his life (computing interest at 3 per cent) must have accumulated approximately \$3,300; a woman nearly \$3,600. If only this amount of income is allowed to all of the people of 65 years and over, the cost of support of the aged would represent a claim upon current national production of \$2,000,000,000 per year. Regardless of what may be done to improve their condition, this cost of supporting the aged will continue to increase. In another generation it will be at least double the present total.

II. DEVELOPMENT OF STATE OLD-AGE ASSISTANCE LAWS

A series of State commissions began almost 30 years ago to investigate the plight of the aged, and shortly thereafter the American Association for Labor Legislation and the fraternal orders led by the Eagles, began to urge legislation on behalf of the needy aged. Until 10 years ago the only permanent provision for the needy aged in nearly all the States was through the medium of the so-called

"almshouse" or "poor farm." The shocking conditions existing in the majority of these institutions were described in a book by Harry Carroll Evans, published in 1926 by a group of fraternal organizations.² This book summarized the findings of the surveys of American almshouses conducted by these organizations, with the aid of special examiners from the

² *Social Security in America*, pp. 156-165.—E.S.

² Evans, Harry C., *The American Poor-Farm and Its Inmates* (Des Moines, 1926).

United States Department of Labor. Insufficient and unfit food, filth, and unhealthful discomfort characterized most of them. Even in institutions with sanitary and physically suitable buildings, it was found that feeble-minded, diseased, and defective inmates were frequently housed with the dependent aged.

The cost of maintaining old people in these institutions, as was revealed by a financial survey of almshouses made by the Federal Department of Labor in 1925, was high, principally because of inefficient "overhead."³

Stimulated by the facts disclosed in these two reports, the drive for regular noninstitutional aid for needy old people made more progress. A series of measures variously described as "old-age pensions," "old-age assistance," "old-age relief," and "old-age security" were passed by State after State, beginning with Montana in 1923, totaling 18 by the middle of 1931, and 28, with two additional Territorial laws, by January 1, 1935. These measures offer citizens of long residence, who have small assets and no financially competent relatives, monthly grants to enable them to maintain themselves outside institutions. The maximum monthly sums authorized range from \$15 to \$30 (the latter being the commonest figure). New York and Massachusetts put no maximum on their possible grants. From January 1 to July 1, 1935, 7 additional States enacted old-age assistance laws, and about 10 other States revised and liberalized their old-age assistance laws in anticipation of Federal aid.

The early measures made the county the fiscal unit. The trend now is toward State aid to the counties or State assumption of the entire responsibility.

The old-age assistance statutes mentioned above mark the first legislative

attempts to remedy the complete and shameful neglect of the old-age problem in the United States. Even with their limited functioning they have enabled 236,000 destitute old people, who have no family able to support them, to escape the miserable almshouse existence to which many needy aged persons previously were doomed. One of the serious limitations of these measures is the long residence qualification, 15 years or more, which characterizes most of them. . . . While the residence requirements of the various States differ widely, it would appear . . . that a reduction of required residence to 5 years in the last 9 before applying for assistance would include practically all the old people on relief at the time of the survey and yet not fasten upon the States the burden of providing special assistance for mere transients.

It must be conceded, however, that the maximum possible grants in some of the acts are inadequate for comfortable existence and that actual grants, as information recently gathered indicates, in some States are even below general relief standards. In only 16 of the States were the measures functioning at all at the end of 1933, and only 9 more States started to give pensions in 1934. Moreover, during 1934 the grants were given throughout the whole State in only 11 States and 1 Territory. To quote from the recent report made by the United States Bureau of Labor Statistics, "sharply curtailed benefits and refusal to take on new pensioners, even the discontinuance of the system altogether until times improve, these are some of the measures to which the pension officials have been forced. In certain other jurisdictions, the result has been to crystallize the plan and to build up a waiting list as large or larger than the number of actual beneficiaries."⁴

The history of the old-age assistance

³ Stewart, Estelle M., "The Cost of American Almshouses," *Bulletin of the U. S. Bureau of Labor Statistics* No. 386 (U. S. Government Printing Office, Washington, D. C., 1925).

⁴ Parker, Florence E., "Experience Under State Old-Age Pension Acts in 1933," *Monthly Labor Review*, vol. 39, no. 2, August 1934, p. 257.

movement in the United States indicates that the American States were slow to enact legislation giving aid to the destitute aged. Long before they took action, European countries, industrial as well as nonindustrial, had recognized the problem of old-age dependency by making provisions for old people. In Australasia, public old-age relief systems had become well established before the World War. In the United States, on the other hand, the movement for old-age assistance did not get under way until after the depression of 1920-21.

This indifference to the problem of the aged can be explained only partially by the American public's lack of confidence in State action. The fact is that a large portion of the American people were convinced that persons who had been hard working and thrifty all their lives would not become destitute in their old age; only shiftless and lazy people were faced with dependency in their later years. This meant that to give State old-age relief was tantamount to rewarding the one who had not done his duty toward society. In addition to this philosophy of thrift and self-reliance, there was—and there still is—extant in the United States a conviction that it is the duty of the children, and not of the State, to take care of the old. It is assumed that if the State relieves the children of this responsibility, family ties are loosened, and, since the family is one of our most highly valued institutions, this danger is to be avoided at all costs.

Investigations on the extent of old-age dependency made by a number of State commissions in the twenties and early thirties disrupted once and for all the comfortable belief that "deserving" citizens do not become dependent in their old age. But the laws which were passed following the recommendations of the commissions made it clear that even though the States instituted a system of old-age relief, children and relatives were not to be relieved of the responsibility to

provide for their aged parents. All laws, with the exception of those of Arizona and Hawaii, exclude from State assistance all those who have financially competent children or relatives.

The movement for State old-age relief began in Massachusetts, where, in 1903, the Bureau of Statistics of Labor made an investigation in which it attempted to calculate the cost of a system of old-age assistance. The next step in the history of the movement was again taken by Massachusetts, where, in 1907, the legislature appointed a commission which was instructed to investigate old-age dependency. The report of this commission was not made until 1910. From that time on a number of old-age survey commissions investigated the problem.⁵

There are to be distinguished in these investigations two periods—one period before the depression of 1920-21 and the other since then. In the first period the commissions held very divergent views on the reasons for old-age dependency. A number of them recommended health insurance as a solution to the problem of old age; others were opposed to State action in the field, while only two were sympathetic toward old-age assistance grants. The Pennsylvania report of 1919-21 marked the beginning of a new trend. In it, the attitude that poverty and pauperism were the direct consequences of laziness and deliberate transgressions was abandoned for the first time, and the State was urged to grant old-age assistance. From that time on the many commissions which were appointed to study the question all reached the conclusion that it is the responsibility of the State to provide

⁵ The following is a list of these commissions and the years in which their investigations were started: 1910, Massachusetts; 1914, Massachusetts; 1915, Wisconsin; 1917, New Jersey (two commissions), California, Massachusetts; 1919, Ohio, Connecticut; 1919-21, Pennsylvania; 1922, Montana; 1925, Massachusetts, Nevada, Indiana; 1926, Virginia; 1928, California; 1929, New Jersey, Minnesota, Maine; 1930, New York; 1932, Connecticut.

for its dependent aged if no children or relatives are able to do so.

The brief history of legislation in the various States, given in the following paragraphs, is based on Bulletin No. 561 of the Bureau of Labor Statistics, *Public Old-Age Pensions and Insurance in the United States and in Foreign Countries*. The first State law was passed in Arizona in 1915 by an initiative act, which abolished almshouses and established provisions for old-age assistance and aid to dependent children in their stead. However, it was worded so loosely that it was declared unconstitutional on account of its vagueness. In the same year Alaska passed a law providing assistance to its aged pioneers. This law, though it has been amended on different occasions, is still in effect at the present time.

No action was taken by any State until 8 years later, in 1923. In that year three States (Montana, Pennsylvania, and Nevada) passed old-age assistance laws, but only one of them, that of Montana, has remained on the statute books. In 1925 the Nevada State Legislature passed a bill repealing the 1923 law and putting another one in its place. The Pennsylvania law was declared unconstitutional in 1924 on the ground that it was in conflict with a provision in the State constitution, which prohibited the legislature from making appropriations for charitable, benevolent, and educational purposes. A movement was started immediately to amend the constitution, but it was not until 1931 that the amendment passed the legislature. Since this amendment had to be repassed in 1933 and then submitted to a referendum vote for approval, it was not until 1934 that Pennsylvania secured action. Thus the decision of the court deferred legislation for 10 years in Pennsylvania.

Ohio, too, took some first steps in the year 1923. The question of old-age assistance was submitted to a referendum vote,

but it was decided adversely by a vote of almost 2 to 1.

By 1925 the movement had gained considerable impetus. Although only Wisconsin enacted a law in that year, there was much activity in a number of the States. California passed a law, which however, was vetoed by the Governor. Bills were introduced in the legislative sessions of Illinois, Indiana, Kansas, Maine, Michigan, Minnesota, New Jersey, Ohio, and Texas. In Indiana and Illinois the bills passed the lower house but were not acted upon by the upper chamber. In four States (Colorado, Minnesota, Pennsylvania, and Utah) commissions were appointed.

In 1926 one law was added, that of Kentucky. In the same year the Washington State Legislature approved a bill, which was vetoed by the Governor. In 1927 Maryland and Colorado enacted old-age assistance laws.

At the end of 1928, after 6 years of agitation, there were only six States and one Territory which had made provision for their aged. They were Colorado, Kentucky, Maryland, Montana, Nevada, Wisconsin, and Alaska. All the State laws were of the optional type, i. e., they left the adoption or rejection of an old-age assistance system to the discretion of the counties. For this reason these laws had very limited effect. In these six States there were slightly more than 1,000 recipients of old-age assistance grants, and these were found almost exclusively in Montana and Wisconsin, the former having 884, the latter 295 old people on their old-age assistance rolls. The total amount spent by the six States in 1928 was, in round numbers, \$200,000.⁶

From 1929 on the trend in legislation has been toward making the adoption of the old-age assistance systems mandatory upon the counties. This type of legislation

⁶ "Operation of Old Age Pension Systems in the United States in 1931," *Monthly Labor Review*, vol. 34, no. 6, June 1932, table 5, p. 1266.

proved much more effective, especially when it was accompanied by a provision by which the State shared in the expense of the county. Of this latter type was the California law which was passed in 1929. In the same year Minnesota, Utah, and Wyoming passed laws which did not provide such State assistance, although those of Utah and Wyoming made the adoption of the system mandatory upon the counties.

In 1930 the Massachusetts and New York laws were passed which not only were of the mandatory type but also provided that the State share in the expense of the locality.

In 1931 and 1933 State legislatures were very active in the field of old-age assistance. It is estimated that 100 bills were introduced in the legislatures of 38 States in 1931. In that year five new laws were enacted in Delaware, Idaho, New Hampshire, New Jersey, and West Virginia. Of these, all except the West Virginia law were of the mandatory type, but only Delaware and New Jersey provided for State funds. Colorado and Wisconsin amended their laws making them mandatory upon the counties as well as making State funds available for the purpose of old-age assistance.

Ten more laws were added in 1933 in Arizona, Indiana, Maine, Michigan, Nebraska, North Dakota, Ohio, Oregon, Washington, and Hawaii. With the exception of Hawaii, they were all mandatory upon the counties, but in Oregon and Washington the State did not share in the expenses of the locality. Arkansas passed a law in 1933, but it was declared unconstitutional by the State supreme court.

Iowa and Pennsylvania passed mandatory laws in 1934, the State bearing the entire cost. By the end of 1934, 28 States and 2 Territories had passed old-age assistance laws.

Summary of the Provisions in Effect, January 1, 1935.— . . . As indicated in the

discussion above, the effectiveness of these laws depends to a large extent on the degree to which the State shares in the responsibilities of administration and cost. The State has complete supervision or exclusive State administration only in those States where it bears the whole cost. This is the case in Alaska, Delaware, Iowa, Michigan, North Dakota, Ohio, and Pennsylvania. In other States, where the State bears part of the cost of old-age assistance, there is a considerable amount of State supervision. This is true in Arizona, California, Indiana, Maine, Massachusetts, New Jersey, and New York. Colorado and Wisconsin are the only States which give money to the counties and leave to them the administration of the fund, requiring only an annual report to the State office. Such an annual report is required in a number of other States from the counties administering the laws. This provides little guaranty that the laws are actually enforced. A number of States left the entire responsibility to the counties, requiring not even an annual report. These States were Kentucky, Minnesota, New Hampshire, Utah, and Washington.

It is safe to make the general statement that the purpose of these old-age assistance laws has been carried out more effectively in the States which provide effective State supervision than in those which make the counties entirely responsible. The ratio of recipients of assistance grants to the number of people of eligible age is highest in the States where there is complete State supervision.

In other respects the various laws are quite similar. All State laws require that the recipient of assistance grants must be needy. With the exception of Arizona and Hawaii, they all specify that assistance grants must not be paid to old people who have children or relatives able to support them. New York and Massachusetts are the only laws which do not set a maximum amount of assistance; this maximum is as low as \$15 in some States, but

most of the laws set it at \$30 a month. The age limit is 65 years of age in a majority of the States; but in quite a few of them it is 70. The most serious restrictions are the citizenship and very long residence requirements. Under most of the laws, in order to receive old-age assistance, a person must have been a citizen and a resident in the State for 15 years, and in a few States the residence requirement is even higher. Many States require a long period of residence in the county or city. The great majority of the States have income and property qualifications. The property limit is \$3,000 in most of the laws, while the income limit is \$300 to \$365 a year. A few of the newer laws omit altogether these property and income qualifications and leave to the administrator the decision of whether or not a person is in need. Many of the laws include the provision that the transfer to the assistance authority of any property the applicant may possess may be demanded before assistance is granted. In most laws there is a provision that assistance must be denied to persons who have deprived themselves of property in order to qualify for aid. Almost all the laws provide that the amount of assistance paid shall be a lien on the estate of the recipient and shall be collected upon his death or the death of the surviving spouse. The majority of the laws provide for a small funeral allowance.

In addition to these qualifications, several old-age assistance laws make sure that the recipients of aid are "deserving" citizens. People who have deserted their husbands or wives, who have failed to support their families, who have been convicted of a crime, who have been tramps or beggars, who have failed to work according to their ability, are ineligible to assistance in most of the States. Inmates of jails, prisons, infirmaries, and insane asylums are also barred from receiving grants. A few States permit the payment of the assistance grant to a benev-

olent and fraternal institution after a recipient becomes an inmate, but they make such payment subject to the proviso that the institution may be inspected by the old-age assistance authority.

After this survey of the many restrictions in the old-age assistance laws, particularly the requirement that the recipient must be in actual need, it is not surprising to find that their operation has been much more limited than in other countries which have adopted noncontributory old-age pension legislation. The percentage of old people on assistance rolls in the United States is far below that of European countries, Canada, and Australasia. Several of these countries pay pensions to all aged persons whose income is less than a specified amount, not requiring proof of actual need.

Operation of State Laws.—Data furnished by the Bureau of Labor Statistics indicate the experience under old-age assistance acts in 1934. Some 236,000 old people were being cared for through the medium of public old-age assistance at the end of 1934. During the year over \$32,000,000 was spent for this purpose. . . .

Although 28 States and 2 Territories had old-age assistance acts on the books at the end of 1934, in only 25 States and 2 Territories were grants actually being paid. In 3 States the act was entirely inoperative because of lack of funds. In only 10 States was the system State-wide.

The average monthly grant paid ranged in the various States from 69 cents in North Dakota to \$26.08 in Massachusetts. In the former State a total of \$507,744 should have been available to meet the old-age assistance obligations. The system is, however, financed by a property tax of 0.1 mill, which, during 1934, yielded only \$28,534. The amount paid in grants totaled \$24,259. The sum available for distribution, therefore, fell short of the sum awarded by more than \$475,000. Dividing the funds among the recipients on a pro-

rata basis, the average was 69 cents a month.

The three State-wide systems of longest experience are those of California, Massachusetts, and New York. It is an interesting fact that year after year the average allowance runs practically the same in these three States (one of which has a maximum of \$30, while the other two

have no maximum). In 1934 the average grant was \$20.21 in California, \$26.08 in Massachusetts, and \$20.65 in New York. These data were collected in the annual survey of old-age assistance made by the Bureau of Labor Statistics. The figures indicate, however, that 13 States and 1 Territory were paying grants averaging less than \$10 per month in 1934. . . .

III. POSSIBLE FEDERAL INTERVENTION IN BEHALF OF THE AGED

THE RECOMMENDATIONS OF THE COMMITTEE ON ECONOMIC SECURITY ¹

In 1934 President Roosevelt appointed a Committee on Economic Security consisting of the secretaries of labor, the treasury, agriculture, and the attorney general and the Federal Emergency Relief administrator. The report of the Committee transmitted to the Congress in 1935 laid the basis for the Social Security Act. It is worth while, therefore, to examine the recommendations of the Committee and the reasons for them.

* * * *

In entering upon an exposition of proposals for old-age security, it should be asserted that the "poorhouse" or "alms-house" method of providing for all aged dependents has been rejected by thinking opinion as both wasteful and inhumane. Noninstitutional assistance for those who are not in need of institutional care has become an accepted standard of decent provision for the dependent aged.

In popular discussion of proper plans for the aged in an economic security program, the issue of choosing between non-contributory old-age assistance and a system of contributory old-age insurance has been raised. It seems apparent, however, that an effective old-age security program for this country involves not a choice between assistance and insurance but a combination of the two. It seems equally apparent that only assistance programs can

serve to meet the problem of the millions of persons who are, or soon will become, superannuated and dependent. An insurance program coming into operation some years hence obviously offers no solution for the problems of the near future. It can, on the other hand, afford younger workers the opportunity to build up a certain protection against dependency in their old age. Regular benefits are unquestionably to be preferred to assistance grants. They come to the workers as a right, whereas assistance is conditioned upon a "means" test. Assistance, moreover, in fairness to the legitimate demands of other needy groups, must limit all grants to a minimum standard. Insurance benefits, on the other hand, can be ample for a comfortable existence, bearing some relation to customary wage standards.

An old-age insurance program could be expected in time to carry the major, but never the entire, load. Administrative problems stand in the way of covering in an insurance program all employed persons who need old-age protection. Moreover, it may always be expected that some persons whose income has been derived from other sources than wages will come to financial grief and dependency in old-age. Assistance programs have a definite place, even in the long-time planning for old-age security. In consideration of the

¹ *Social Security in America*, chap. X.—E.S

advantages of old-age insurance, the limitations imposed upon the Federal Government by our Constitution which would affect the adoption of such a program were fully recognized.

The recommendations for a system of old-age insurance outlined in the succeeding pages must, therefore, be considered in the light of the specific recommendations later advanced for a fundamentally altered program of old-age benefits believed to be legally feasible at this time. The reasoning which has led to these specific recommendations can be reported, however, only by outlining the more general conclusions from which they have evolved.

The old-age security program proposed comprised three separate plans:

(1) A Federal program of grants-in-aid to the State old-age assistance laws.

(2) A Federal system of old-age annuities covering those classes of employed persons which can be effectively brought within such a system.

(3) A system of voluntary old-age annuities for persons of low and moderate incomes not covered by the old-age insurance system. . . .

OLD-AGE ASSISTANCE

. . . There were, prior to the introduction of the Social Security Act, 28 States and 2 Territories with old-age assistance laws which professedly offered to aged persons varying standards of aid. Six of these laws were practically nonfunctioning. Four were just getting under way. Many of the others, because of financial stringencies, had cut assistance grants below a proper minimum and had long waiting lists of needy persons. It would seem quite clear that, as a result of the financial problems of many of the States and the indifference of others, State action alone could not be relied upon to provide either adequate or universal old-age assistance.

Basic Considerations.—The specific rea-

sons influencing the recommendations for a program of old-age assistance were as follows:

(1) To help in the expansion of the use of the old-age assistance technique, both to additional States and to all subdivisions of States with nonmandatory laws. The provision of matching grants had proved to be an effective means of aiding States to enact welfare legislation.

(2) To permit and aid more adequate financing of State plans. By the provision of Federal aid on a matching basis, not only would a Nation-wide tax base be utilized as a source of a part of the funds, but the use of a broader tax base within the State would be encouraged. The inadequacy of the grants paid in most States with assistance plans indicated the pressing need for additional funds.

(3) To permit and aid improvement in standards of administration, minimum grants, and coverage of State plans. The particular standards which were deemed worthy of aid were:

(a) State-wide coverage either under State administered plans or plans mandatory on State subdivisions.

(b) The establishment or designation of a State welfare authority responsible for the administration of the plan. It was believed that centralized responsibility for administration not only would avoid a diversity of operating standards in the subdivisions within the State, but would permit closer contacts between the several States and between the Federal Government and the particular State in cooperating to raise the level of effectiveness of assistance programs throughout the country.

(c) The assurance to any claimant for assistance of the right of appeal to the State authority. This would provide a further assurance of the uniformity of administrative effectiveness within the State.

(d) Adequate reporting through the requirement that complete reports be made to the Federal administrative

agency in accordance with regulations established by that agency.

(e) The assurance that the minimum assistance grant made by the State would provide a reasonable subsistence compatible with decency and health when combined with any income the claimant might possess. While the monetary cost of such reasonable subsistence would vary throughout the country, it was believed that a lower limit to grants, related to local costs of living, should be established. The provision of matching grants by the Federal Government might well make it possible to raise the level of the assistance afforded by State programs under normal conditions. An established minimum would, however, avoid the spreading of funds too thinly or the progressive lowering of grants in time of financial stringency.

(f) A widened coverage through the elimination of a required period of citizenship; the reduction of the period of required residence in the State; the raising of the property limit; and the lowering of the age limit, at least after a few years. The diverse standards of eligibility in State old-age assistance laws greatly reduced the effectiveness of assistance programs in meeting the growing need for old-age relief. Since needy old persons must be aided in some manner, arbitrary requirements of years of citizenship and many years of residence for eligibility for assistance merely shift individual claimants from a more adequate system of relief to a less adequate. With the extension of assistance legislation to more States, the fear of an incursion of older dependent persons into a particular State would be lessened. The provision of Federal funds would lessen the justification of a restriction of assistance grants to American citizens of long residence in a particular State. Statistics of dependency and of relief experience during the recent depression indicate that the limitation of assistance to persons aged 70 or over excludes

far too great a proportion of dependent aged persons. Not only had the depression itself left many older persons permanently dependent, but persistent changes in our economic life have lowered the age at which superannuation is likely to occur.

The raising of the property limit was intended to permit greater flexibility in handling those situations where the claimant might possess such useful assets as a home, a small piece of land, tools, or furnishings. To the extent that income accrues from these assets, this income might reduce the amount of the grant necessary. It was proposed that a lien be placed against the estate of the recipient at least for the amount of the assistance granted by the Federal Government. This requirement indicated a practical method whereby the States might control expenditures or assistance to persons with considerable assets.

(g) The use of the inadequacy of the claimant's income as the test of need in providing a reasonable subsistence compatible with decency and health, and not the inadequacy of the income of other persons who might, on account of family or similar ties, be expected to support the claimant. It was not the intention, in recommending this narrower application of the means test, to discourage in any way the support of needy aged persons by their relatives. Rather, it was to avoid the distress which might occur when relatives obligated to provide support failed to do so or failed to afford sufficient aid. It did not seem proper that the aged person should be excluded from assistance in such situations. Rather, assistance should be given, with the possibility of legal suit for the recovery of the amount of such assistance brought by the State assistance authority against any legally responsible relatives. It was considered more advantageous, both socially and administratively, to encourage an arrangement whereby legal action against indifferent relatives, where necessary, would be

brought by a public authority rather than by the needy aged person. The possibility of such suits might go far to render them unnecessary.

It was believed that the offer of a subsidy by the Federal Government to an amount equal to the assistance afforded by the States (but limited to \$15 per month on account of any individual) under approved plans would not only cause the extension of State assistance legislation but would make possible the adoption of these more adequate standards throughout the country. While earlier proposals for Federal subsidization called for a ratio of Federal to State appropriations of but one to two, on account of the growing urgency of the need for assistance programs, the financial stringencies faced by many States, and the higher standards of legislation now called for, it was deemed advisable to recommend the more favorable ratio of dollar for dollar. To encourage effective administration, it was suggested that State expenditures for administration be matched at the same ratio up to a maximum of not more than 10 per cent of the total expenditures for assistance in the State. With an adequate proportion of funds assigned to administration, the Federal and State authorities could cooperate more effectively in the development and extension of improved administrative techniques. . . .

The justification of a Federal subsidy to State old-age programs is readily apparent from a study of current conditions as to old-age dependency, the shortcomings of existing State old-age assistance programs, and the limitations of State and local public finance. . . .

Proposals to the Congress.—It was recommended to Congress:

(1) That the Federal Government offer grants-in-aid to those States and Territories which provide old-age assistance for their needy aged under plans that are approved by a Federal authority, such

plans to include proposed administrative arrangements, estimated administrative costs, and the method of selecting personnel.

(2) That the grants-in-aid constitute one-half of the expenditures, including administrative expenses, for noninstitutional old-age assistance made by any State or Territory under a plan approved by this Federal authority, provided that in computing the amount of said grants-in-aid not more than \$15 per month shall be paid in Federal subsidy on account of assistance provided for any aged persons in such State or Territory nor more than 5 per cent of the total expenditures for assistance on account of administration.

(3) That a State or Territory, on account of administration, shall be free to impose qualifications upon the granting of assistance to needy aged persons, but that it be stipulated in the congressional statute providing for the grants-in-aid that no plan shall be approved by the Federal administrative agency unless it—

(a) Is State-wide or Territory-wide and, if administered by subdivisions of the State or Territory, is mandatory upon such subdivisions; and

(b) Establishes or designates a State welfare authority which shall be responsible to the Federal Government for the administration of the plan in the State, and which shall administer the plan locally through local welfare authorities; and

(c) Grants to any claimant the right of appeal to such State authority; and

(d) Provides that such State authority shall make full and complete reports to the Federal administrative agency in accordance with rules and regulations to be prescribed by the Federal administrative agency; and

(e) Provides a minimum assistance grant which will afford a reasonable subsistence compatible with decency and health, provided that, if the claimant possesses income this minimum grant may be

reduced by the amount of such income; and

(f) Provides that whether or not assistance shall be denied to certain needy aged persons it shall be granted at least to any person who:

- (1) Is a United States citizen; and
- (2) Has resided in the State or Territory for 5 years or more within the 10 years immediately preceding application for assistance; and
- (3) Is not an inmate of an institution; and
- (4) Has an income inadequate to provide a reasonable subsistence compatible with decency and health; and
- (5) Possesses no real or personal property, or possesses real or personal property of a market value of not more than \$5,000; and
- (6) Is 70 years of age or older; provided that after January 1, 1940, assistance shall not be denied to an otherwise qualified person after he is 65 years of age or older; and

(g) Provides that at least so much of the sum paid as assistance to any aged recipient as represents the share of the United States Government in such assistance shall be a lien on the estate of the aged recipient which upon his death shall be enforced by the State or Territory and the amount collected reported to the Federal administrative agency.

Legislative Modifications of the Proposals.—These proposals were embodied in the original economic security bill introduced in Congress on January 17, 1935. This bill was introduced in the Senate by Senator Wagner (S. 1130) and in the House of Representatives by Congressmen Doughton (H. R. 4120) and Lewis (H. R. 4142). After hearings before the House Ways and Means Committee this bill was not recommended. In its stead the social security bill (H. R. 7260) was introduced and recommended for passage; this bill became law on August 14, 1935. In the act as passed Congress adopted the basic principle of Federal grants-in-aid to States with old-age assistance programs meeting certain requirements. However, several important

changes were made in Congress in the proposed standards for State old-age assistance programs required as a condition for Federal subsidy. The principal legislative modifications were the following.

(1) The required condition that State old-age assistance plans should furnish assistance sufficient, when added to the income of the recipient, for "reasonable subsistence compatible with decency and health" was rejected by Congress.

(2) The proposal that the test of need, to be used in approved State old-age assistance plans in the determination of eligibility for grants, be limited to the adequacy of the income of the aged person, together with that of his or her spouse, was rejected.

(3) Congress rejected the proposal that a State plan for old-age assistance should not be approved if it denied assistance to any United States citizen who met the requirements of minimum age and residence whose property and income were not in excess of a specified maximum, and who was not an inmate of an institution. Under the act as passed, a State which wishes to receive Federal aid is left free to impose any requirements upon applicants for assistance, except that it cannot impose a residence requirement in excess of 5 years within the last 9 years immediately preceding application for aid, or an age requirement of more than 65 years (70 years until January 1, 1940), or a citizenship requirement which excludes any citizen of the United States.

(4) The proposal that the Federal Government should share with the States the cost of administration by payment of an amount not to exceed 5 per cent of the State's total expenditures was modified to a provision that 5 per cent of the Federal grant payable to the State for giving assistance to individuals should be paid to the State. The State might use this amount either for paying the costs of administration or for assistance to individuals, or both, but for no other purpose.

A SYSTEM OF OLD-AGE ANNUITIES

With the recognition of the conditions which necessitate Federal financial participation in buttressing existing techniques in meeting old-age dependency in this country, there follows inevitably the conclusion that existing techniques will soon prove inadequate to cope with this mounting problem. . . . It was, therefore, concluded that a system of contributory old-age insurance should be established at the earliest possible time to control the upward trend in expenditures for old-age assistance. Only through the method of preventing dependency through some form of cooperative thrift can the cost of relief be kept down. Old-age insurance financed in large measure from the contributions of workers and their employers would serve to protect an increasing proportion of our citizens from the hazard of old-age dependency and at the same time retard the mounting trend of assistance expenditures.

A corollary reason for the early establishment of a system of old-age insurance was the urgent necessity of preventing the untoward social consequences of increasing dependence upon old-age assistance on the part of our citizens. Since assistance is granted on the basis of need, it tends to discourage thrift, which would render assistance unnecessary. Under a system of old-age insurance, individual need would not be a determinant. Since insurance benefits would be received as a matter of right, based on contributions related to wages, workers would be encouraged to maintain the best possible record of employment and wages in order to earn the right to a high rate of benefits. Savings or other assets would in no way reduce the amount of benefits received but would provide a means of augmenting income in the later years of life.

The Advantages of the Insurance Method.—The certainty and regularity of insurance benefit payments would greatly

enhance the sense of security of the superannuated person. The prospect of recurrent investigations and possible changes in status and grants based upon varying regulations, interpretations, and conditions in State finances limit the degree of assurance which the recipient of assistance can feel. Benefits paid under a system of old-age insurance would be determined at the time of retirement and continued without change during the period of retirement. The social advantages of an insurance program seemed marked.

The conditions surrounding the payment of benefits under an old-age insurance system would enhance the economic effects of an old-age security program. Under the method of old-age assistance superannuated persons are encouraged to compete in the labor market as long as possible to eke out a more satisfactory existence. Assistance grants may prove a subsidy to superannuated workers which will permit them to accept lower wages than younger workers in competition for jobs. Administrative authorities seeking to hold down assistance expenditures may stimulate such competition as a means of reducing grants in individual cases. The effect on the employment opportunities of younger men and upon wage rates might prove most unfortunate. Under a system of old-age insurance, the opposite effect would ensue. Since retirement from regular employment could be made a condition for receipt of benefits, the displacement of superannuated workers from the labor market would be accelerated.

The certainty and regularity of benefit payments under an old-age insurance program would serve to stabilize in some degree the flow of consumption expenditures on the part of our superannuated population. With a definite retirement income assured, superannuated persons would be more likely to maintain a normal rate of expenditure in good times and bad. As benefit payments rose and more persons became eligible to receive them, it

might safely be prophesied that this added element of stability in our economic system would have considerable influence. The less tangible effects should not be disregarded. The confidence and sense of security of a mature group of citizens could not but affect the attitudes of younger groups.

American experience with industrial pension programs, while strictly limited in extent, and by no means universally successful, serves as a basis for demonstrating the social and economic advantages of an old-age insurance program. The more adequate pension programs have served to protect those eligible for benefits from distress in old age and thus have afforded some sense of security both before and after retirement. Related to employment and wages, such programs have tended to encourage rather than discourage continued initiative on the part of the prospective recipient. They have also enhanced thrift through increasing the appreciation of the satisfactions of planned security. At the same time, pension payments, where adequate, have served to prevent the necessity for superannuated persons to compete for jobs against younger and more active workers. In these cases, they have increased employment opportunities, accelerated promotions, and prevented the depressing effect on wage rates which the competition of superannuated persons might cause. For a limited number of individuals industrial pension programs have served to make retirement from active life a cause of satisfaction rather than a misfortune. The very limited coverage and frequent shortcomings of most existing industrial pension programs prevent, however, any reliance upon such programs in meeting the problem of old-age dependency facing the country. In the few instances where private pension plans afford more generous protection than the public system here considered, the industrial plans could be readily adjusted to supplement such a

system. Only through a uniform basic program can industrial employees generally be effectively protected in old age.²

The experience of other countries with various types of old-age security measures serves to justify further the conclusion that old-age assistance cannot be permanently relied upon as the sole means of meeting the problem of old-age dependency in an industrial country. Contributory old-age insurance programs developed in other important industrial nations include the features of definite payments to eligible beneficiaries, paid as a matter of right and computed on the basis of previous earnings in gainful employment. The inadequacies and social and economic effects of means-test assistance have weighed heavily in the decision to establish the more constructive programs. While the source of funds in most of these foreign plans is in part the contributions of workers and employers, appropriations from the general governmental funds are quite usual. The shift from gratuitous pensions granted on a needs basis to annuities earned as a right through contributions to an insurance system is a significant feature in development of old-age security abroad.

The Necessity of a Single Federal System.—In considering a program of old-age insurance, the question soon arose

² It was considered neither feasible nor desirable to exempt employers and workers party to private pension plans from coverage under a compulsory old-age insurance program. A social insurance program serves a broad public purpose and is designed to meet basic needs. Private pension plans are adjusted to the interests of a relatively small group of persons—those attaining retirement age with a record of faithful service for a particular employer. To warrant exemption, existing private pension plans would need to undergo thorough reconstruction in coverage, financing, standards, and administration. At the same time, the Government would, under such an arrangement, face serious problems of finance and administration in attempting to safeguard both the general insurance system and the employees affected. On the other hand, employers desiring to provide more liberal benefits will be able to work out supplementary programs which will be entirely apart from governmental supervision.

whether a more or less related aggregation of State plans or a single Federal system was preferable. The answer to this question was not merely one of preference but of absolute necessity. After thorough canvass of the technical, economic, and administrative problems involved, the conclusion was reached that only through a single national administration could effective operation be assured. The reasons leading to this decision may be summarized:

(1) The mobility of population across State lines would make the use of the actuarial precedures necessary in any workable plan impossible on any but a country-wide base. While such estimates as those of population growth, age distribution, and mortality could be developed with sufficient accuracy for the total population, future migrations of young or old persons from one State to another, whether for climatic considerations or as a result of shifts in industry, would make such estimates untenable if constructed on the basis of a single State. The operation of 48 separate systems of old-age insurance would involve virtually insuperable administrative difficulties, excessive costs, and almost certain failure in many States.

(2) Aside from the actuarial problems involved in State administration of old-age insurance, many other disadvantages of separate State systems were apparent after even casual examination. With varying standards of benefits and the probability that many States would fail to act, large numbers of workers moving from one State to another in the course of adult life would reach old age without adequate protection. The mobility of labor would be affected if there were any considerable variation in rates of contributions and benefits. Federal administration, on the other hand, would afford uniform standards over the entire area.

(3) The accumulation of reserves under old-age insurance programs by 48 States

would involve both investment and administrative problems of serious proportions. Not only might the degree of safety and the adequacy of funds vary, but the effects of diverse investment policies upon the credit structure of the country might prove unfortunate. Furthermore, the transfer of individual credits from the reserve account of one State to that of another would require a great amount of administrative labor. Where the reserve policies of States varied in the degree to which accrued liabilities were funded, the transfer of individual credits would lead to difficult adjustments in equities.

(4) Varying rates of contributions under State insurance programs might affect seriously the competitive costs of doing business in the several States. For interstate corporations, the adjustment of industrial pension plans to various State old-age insurance programs would become a most discouraging task.

(5) The argument for State experimentation with social security techniques has much less validity in the case of old-age insurance than in the case of unemployment or sickness compensation, since 50 to 75 years are required to test an old-age insurance system through one complete life cycle. The confusion of various systems in all stages of maturity would, without doubt, soon kill any urge toward continued experimentation.

(6) Finally, the routine character of the administration of old-age insurance would make it more adapted to large-scale operation. Since rates of benefits would be based on past contributions alone, with little if any discretionary determination, the machinery for administering an old-age insurance system would be much simpler than that for administering unemployment compensation. With broad policies determined by a central Federal authority, operating procedures could be reduced to standardized routines. The advantages in economy and convenience resulting from such a uniformity

of procedure alone would seem to warrant the paralleling of old-age insurance with such services as the Federal postal system rather than incurring the vagaries of State workmen's compensation administrations.

It became clear, therefore, that State action could not prevent old-age dependency by establishing independent old-age insurance systems. A study of foreign insurance systems confirmed this conviction. In the field of unemployment insurance a number of national governments in foreign countries limit their function to stimulating voluntary efforts by offering subsidies to regional, local, or industrial funds. However, no foreign government which has adopted the principle of old-age insurance leaves the responsibility of building an old-age fund for the protection of its working people to political subdivisions or to voluntary action on the part of employers or labor unions.

Basic Principles of an Old-Age Annuity System.—Before formulating a program for presentation to Congress, decision had to be reached on the basic provisions to be incorporated in a Federal old-age annuity system, such as the amount of the old-age annuity, the method of financing the benefits, the accumulation of a reserve, the groups to be covered, and the administrative machinery for putting the program into effect.

The Character and Amount of Insurance Benefits.—Although payments to beneficiaries under a system of old-age insurance should bear a definite relationship to the previous earnings of the beneficiary, many factors must be considered in determining the precise relationship which is proper and feasible. After balancing these factors the following conclusions were reached:

(1) The immediate payment of benefits at a rate justified in a system long in operation seems financially impossible. While a rate approximating 50 per cent of previous average earnings is socially de-

sirable, the cost of such benefits would be far too great to be met from worker and employer contributions or to be absorbed by the Government in the early years of the system. Only after contributions had been levied over a period of years could the flow of funds necessary for a full scale of benefits be attained. The charges necessary for such benefits for persons now old should not be suddenly assessed upon the present younger generation of contributors. Instead, the amounts of benefits paid to individuals might, in general, rise gradually over the next generation based on the increasing period of insurable employment of prospective beneficiaries previous to retirement. In this way the costs of the system would be adjusted to the period in which the beneficiaries had contributed to the cost of operating the system either directly through wage deductions or indirectly through the economic income they had helped to produce.

(2) The minimum benefit granted should, however, be sufficient to prove a considerable item of income to the recipient and to warrant the administrative costs of distribution. It was concluded, therefore, that no benefits should be paid during the first 5 years in which the system was in effect and in which contributions were paid. At the end of 5 years annuities should be begun at an initial rate of not less than 15 per cent of average wages. After that time the rates would increase with the number of contributions made. The annuity would amount to approximately 50 per cent of average wages for a person on whose behalf contributions were paid throughout his entire working life. For many years the benefits would be insufficient to provide subsistence unless supplemented from other sources; yet they would have considerable effect in lessening the amount of assistance required. A benefit of these proportions would greatly exceed for many years that "earned" by the contributions assessed in the individual case. The limitation of

benefits to those amounts which could be financed by the contributions of the beneficiary and his employer would result in seriously inadequate protection for a large majority of individuals for a generation to come. For this reason, it was believed that the minimum such as that proposed should be established.

(3) Insurance benefits should be so graduated relative to contributions that (a) persons of lower average income and (b) persons coming under the system relatively late in life should receive higher proportionate benefits. As a social mechanism aimed at the prevention of dependency, an old-age insurance system should be adjusted in some measure to the relative needs of various classes of beneficiaries even though need is not a determinant in the individual case. A further method of insuring that the system will be geared to the needs of persons of small or moderate incomes is the elimination of such income as exceeds a stated amount per week or per month from the wage base upon which benefits and contributions are based.

(4) If old-age insurance benefits are paid to persons continuing in regular employment after attainment of age 65, they will become, in effect, a subsidy to older workers in competing in the labor market. Since the employment and wage rates of younger workers would be adversely affected by such subsidized competition, it was felt that old-age insurance benefits should be suspended in those cases where otherwise qualified persons were regularly employed. It was believed that the social advantages of encouraging retirement at age 65 far outweighed the objection that individual equities would be reduced when benefits were thus suspended. Since the benefits paid after retirement would, in most instances, greatly exceed those financed by the employee's contribution, there was little basis for this objection. In any event, the main purpose of the plan is

to provide a partial compensation for the loss of earned income.

It was felt that a death benefit related to contributions should be paid in a lump sum on the death of persons covered under the system. Where old-age insurance benefits have been paid to the deceased individual, the death benefit should be reduced by the amount of such payments. In this way an equitable relationship could be preserved between the benefits accruing to those who survive to an old age and to the dependents of persons who die at younger ages. A fair arrangement would be the return of the contributions made by the deceased worker to his dependents. While a supplementary system of survivors' insurance paying regular monthly benefits to qualified dependents is socially far more desirable than the benefit here described, it was not deemed advisable to recommend such a system until further investigation was possible.

The Source and Amount of Contributions.—In deciding upon the question of how to meet the cost of an old-age insurance system, all possible sources of Federal revenue were considered. It was believed that personal income taxes with the present exemptions could not be expected to yield sufficient additional revenues to meet the new charges even on the basis of sharply increased rates. Corporate income taxes and inheritance taxes were likewise considered inadequate as a main source of additional funds. Sales taxes, both general and limited, were seen to involve serious fiscal and economic problems warranting their rejection. The incidence of such sales taxes, furthermore, did not appear to bear a reasonable relationship to the purposes served by the new expenditures. After a thorough canvass of the possible sources of income for a system of old-age insurance, it was decided that the following should be utilized: (1) Taxes paid by employees in covered employments determined as a percentage of earnings, (2) taxes paid by

employers in covered employments determined as a percentage of pay roll, and (3) subsidies by the Federal Government financed through taxes not borne by workers. The reasons supporting the use of each of these sources may be outlined.

(1) It is both just and expedient that the future beneficiaries of a system of old-age insurance should bear a part of the cost of its operation. Since benefits under an insurance system would be received as a matter of right without a test of means, the employee eligible to coverage would obtain a virtual equity in the protection afforded. It seemed but proper that the group of our citizens obtaining this assurance of security in their old age should assist in making it possible. Income from gainful employment is a fair measure of financial ability to pay as well as a proper determinant of normal benefits needed to maintain a satisfactory existence following retirement. The determination of contributions as a percentage of earnings rather than as a fixed sum avoids the possibility of hardships in those cases where low earnings are received. Since adjustments in the scale of benefits would be possible, there would be no occasion for a graduated scale of contributions in seeking to approximate more closely the greater proportionate ability of higher income groups.

The setting aside of a percentage of wages has long been a customary method of thrift among American wage earners. Percentage deductions from wages are now being made by many employers in all types of private and public enterprises in financing pensions and other forms of thrift. By contributing through similar deductions to an old-age insurance system, the individual worker would establish an earned right to a benefit related to the contribution made. It is believed that such an arrangement would be both practical to administer and acceptable to the great majority of American employees. By sharing in the cost of the old-age in-

surance system, the workers of the country would be led to assume a greater interest in its proper administration. The importance of efficiency and economy of operations, the necessity for conservative policy in the determination of benefit rates, and the advantages of strict enforcement of collections would be far better understood by persons who, week by week, were helping to finance the system. Resting on a broad base of sustained public interest, the program would gain a large measure of stability.

(2) The cost of maintaining industrial employees in old age after years of productive employment has long been accepted as a reasonable charge against production. Just as industry, generally, has become accustomed to meeting charges for the depreciation and replacement of its material equipment, many employers have developed programs for the payment of retirement allowances to their superannuated employees. These employers include industrial corporations, railroads, public utilities, governments, educational institutions, and other organizations. Such costs are considered proper additions to the cost of production.

It appeared appropriate and reasonable, therefore, that employers in covered employments should contribute to a system of old-age insurance designed to protect their employees. In order to maintain a direct relationship between labor services obtained and the contributions paid by the employer, it was felt that contributions should be computed as a percentage of the earnings paid to an employee covered under the system. The basis of computation of the employer contribution should be identical with that used in determining the contributions of his employees.

There was much reason to believe that the burden of employer contributions to an old-age insurance system would in large measure be shifted to the consumer. The uniform application of the charge throughout a particular industry would

serve to facilitate this shift. Competitive conditions, variations in labor costs per unit of output, and relative elasticities of demand for particular products and services would, however, affect the degree to which such shifting might take place in any situation. It might be that a part of the burden of employer contributions would in some instances be borne partly by the wage earners of an industry through indirect effects upon employment and wage rates. It was believed, however, that in time the incidence of the cost of employer contributions would be spread so broadly over the whole community that no hardship would be imposed upon any particular group. Since the great majority of our citizens, whether rich or poor, employed or self-employed, would be benefited by the establishment of an effective program of old-age security, a broad distribution of the costs of such a program did not seem unjust.

It was felt that the contributions of employers and employees should be at the same rate. While arguments could be advanced for other ratios, experience under contributory pension plans in this country and under compulsory contributory programs abroad indicates the advisability of equal contributions. With such sharing of costs, an insurance system would be accepted as a truly joint enterprise of the employers and workers of the country, aided and supervised by the Government as representing the public as a whole.

Since the assessment of new charges of the character here considered would involve a complex series of adjustments on the part of industry and the public, it was felt that the initial rates of contributions established should be as low as economical administration would permit. Expenditures for benefits would mount but gradually under the program here considered so that such low initial contribution rates would provide adequate income not only for current benefits but for the creation of a contingency reserve. It

must be remembered that even if benefits began after contributions had been collected for 5 years, only that age group just reaching retirement would be eligible for benefits. Meanwhile, contributions would be received from all other age groups from youth through middle age. As time passed and more persons qualified for benefits under the system, it would be necessary to increase the income from contributions. It was felt, therefore, that the joint rates of contributions should be raised in steps of 1 per cent each at intervals of 5 years from an initial rate of 1 per cent. Under such a program, industry, employees, and the public would have adequate time to become adjusted to the gradually increasing cost of the system without serious hardship on any group in our population.

(3) The determination of the maximum rates of contribution to be levied upon employers and employees involved the question of how far the cost of an old-age insurance system should be assessed upon these groups. Since the charge upon the employer might be shifted elsewhere, the question arose as to whether the final incidence of this charge could be determined sufficiently to warrant more than limited use. Employee contributions might well impair the living standards of the workers if rates encroached upon income necessary for decent subsistence.

Contributory old-age insurance would in years to come assume an increasing proportion of the public cost of old-age security. Employers, and especially workers, should not be expected to bear the cost involved in paying more adequate benefits in the early years of the system than individual contributions would warrant, if they are also to build up even partial reserves for the future. Such more adequate benefits would be intended, among other things, to relieve the recipient of the need for State old-age assistance. To the extent that assistance costs were reduced, the expenditures of the Government would be

reduced—a saving which should not accrue at the expense of insurance contributors.

It was felt that the maximum joint rate of contributions by employers and employees to the old-age insurance program should be set at 5 per cent. It was estimated that the rates of contributions here considered would be sufficient to finance the system for approximately 25 years. After this period subsidies would be necessary.

The Accumulation and Maintenance of a Reserve.—In order to insure the availability of funds for the regular payment of old-age insurance benefits to eligible beneficiaries at all times, it was decided that a reserve fund should be accumulated from contributions made to the system in the early years of its operation. An important function of this reserve is to provide funds to meet increasing expenditures which may result in the future from gradual secular changes in the following factors: (1) a decline in the average age of retirement, (2) an increase in the average wage level, and (3) variations in mortality rates before and after retirement. A major depression, moreover, might unexpectedly accelerate any or all of these changes and might call for an unanticipated drain upon the old-age account. The assets of this reserve fund should be invested in the securities of the Federal Government in order to insure the utmost safety and liquidity. During the 25 years when the income exceeds outgo and when reserves are being accumulated, experience would indicate a basis for more accurate decisions as to the exact size of the reserve, how it should be accumulated and over what period of time, and what functions it should serve in addition to those enumerated above.

Coverage.—Since a compulsory program of contributory old-age insurance is intended to prevent destitution in old age, it may be argued that the benefits of the system should be extended to all persons

whose incomes warrant the payment of contributions. The administrative difficulties involved in such universal coverage are, however, readily apparent. An attempt to base contributions on incomes accruing in the form of profits, interest, or rents would be fraught with many difficulties of identification and measurement which would far outweigh the advantages of bringing the recipients of these incomes, as such, within such a system. On the other hand, incomes received in the form of wages or salaries could be more readily determined as a basis for assessment. As a class, wage earners are more in need of old-age protection than are the recipients of other types of income, hence public support for the enforcement of contributions on their behalf could be more readily secured. Further, the payment of wages is a practical basis for contributions assessed on both the employer and the employee. With the employer acting as the agent of the Government in the collection of the employee's contribution and remitting the proceeds along with his own contributions, great economies in administration would be possible. At the same time the employee's interest in insuring a complete record of contributions would serve as an aid in the enforcement of accurate reporting upon less conscientious employers. For these reasons it was deemed desirable to limit the coverage of an old-age insurance system to persons employed for wages or salaries.

Administrative difficulties suggested further limitations of coverage to eliminate, at least in the early years of a system, certain types of employments in which it would be difficult to enforce the collection of contributions. In the case of farm labor and domestic servants in private homes, a large number of individual workers are employed in small establishments scattered over a wide area, frequently at some distance from any city or town. The close relationship which exists between employer and employee, the frequent ab-

sence of accounting records, and the usual provision of a part of compensation in the form of maintenance would greatly handicap effective enforcement. While the need of these groups for protection in old age was very apparent, it seemed expedient to postpone their inclusion until after administrative experience could develop in less difficult areas of operation.

Since Congress had already established retirement programs covering a large proportion of the employees of the Federal Government, it did not seem expedient to include such employees under a general contributory old-age insurance program at this time. Railroad employees had also been covered under special enactments and should be excluded. The employees of the several States and their subdivisions must be excluded because of constitutional limitations on Federal jurisdiction.

With these exceptions, it seemed proper to include within the system all gainfully employed workers regardless of the character or size of the establishment in which they were employed. All workers face the contingency of dependent old age, whether employed in large factories or in small shops or offices, and only serious administrative difficulties, previous legislation, or constitutional limitations should be permitted to interfere with the provision of basic, uniform protection related to contributions.

It was fully recognized in advocating full coverage that there would be a real likelihood that many small employers might evade their obligations, especially at the outset. It was believed, however, that the extent of noncompliance would, with proper educational effort on the part of the Government and with a policy of severe penalties for deliberate evasion, steadily diminish. Since there is a constant flow of workers from large to small establishments, it was believed that limited coverage would eat at the actuarial foundation of the system as well as lessen the adequacy of the benefits afforded. More-

over, the administrative difficulties of ascertaining coverage under a plan limited to establishments with a certain number of employees might prove quite as formidable as those faced in assuring coverage of all establishments.

Administration.—The administrative requirements of old-age insurance are not complicated in comparison with those involved in unemployment compensation, with its need to determine the cause of severing employment, the possibility of reemployment, the suitability of available work, and similar questions. The volume of individual contribution records which must be kept, however, would involve administrative technique on a scale which is new to this country.

Efficient administration would therefore require the services of a staff of specialists in administrative detail. It was felt that experienced administrators from both Great Britain and Germany should be included in any group of experts who might be assembled. The administration of the old-age insurance plan should be the function of an independent board vested with authority to direct all phases of social insurance, working in close cooperation with both the Department of Labor and the Treasury. It would cooperate with the former in all relations with wage earners and employers, with particular reference to the employment agencies, and, with the latter in the collection, investment, and disbursement of funds.

The advantages of an independent board were considered numerous and important. The membership of the board should include outstanding persons in the field of social insurance administration whose services could be procured with difficulty if they were offered positions as lesser officials in any department. In the interests of the insured population, both in the formulation of regulations and in the development of new policies and practices, the board should be a nonpolitical organization, protected as far as pos-

sible from political influence, even such as might arise from an executive department under a politically minded administration. The actual handling and investment of funds would be carried on by the Treasury. The smooth functioning of a program of this magnitude would necessitate a highly competent technical staff. It would probably be easier to obtain appropriate classifications for such employees under the Classification Act in a new independent board than in a new bureau in an established department. In inaugurating an insurance system the Government would assume a new type of financial responsibility to its citizens which should be focused in a body where full time and interest would be directed toward meeting that responsibility.

Legislative Proposals.—It was recommended to the Congress that the Federal Government adopt a program of old-age benefits.³ To this end it was specifically proposed that legislation should include two separate measures, one a taxing measure and the other a permanent appropriation measure.

The taxing measure was to contain (1) a tax upon the income of the workers who were to receive annuities upon reaching retirement age; and (2) an excise tax upon the pay rolls of the employers of these workers. In determining the tax rates, it was considered desirable that the amount yielded be equivalent to the worker and employer contributions which would have been required if the program proposed had been a contributory old-age insurance system. The following tax schedule was recommended:

Years	Excise tax on employers' pay rolls (per cent)	Income tax on employees' wages (per cent)
1937-41	$\frac{1}{2}$	$\frac{1}{2}$
1942-46	1	1
1947-51	$1\frac{1}{2}$	$1\frac{1}{2}$
1952-56	2	2
1957 and thereafter ..	$2\frac{1}{2}$	$2\frac{1}{2}$

³ See Committee on Economic Security, *Report to*

The proceeds derived from these taxes were to be allocated to an old-age fund to be established in the Treasury.

While it has been recognized that administrative difficulties might stand in the way of collecting taxes from agricultural and domestic workers and their employers, these groups of workers were included in the bill originally introduced in Congress. This was in accordance with recommendations submitted by the Committee on Economic Security to the President on January 15, 1935.

It was considered advisable to bring under the tax program as wide a group of workers as possible, for under the proposed plan only through the payment of taxes could a worker earn the right to an old-age annuity. However, certain exemptions were recommended. The most important groups exempted and the reasons for their exclusion from the tax and annuity program may be briefly summarized. The annuity program was primarily designed for persons in lower-income groups. It was, therefore, recommended that nonmanual workers earning in excess of \$250 a month be exempted from the taxes, and in consequence excluded from the benefits recommended. Because they were already provided for under public retirement systems, it was recommended that employees of the Federal Government subject to the United States Civil Service Retirement Act and persons covered by the United States Railroad Retirement Act, together with their employers, be exempt from the tax. Furthermore, since, under the Constitution, the Federal Government cannot impose taxes upon States and subdivisions of States, it was considered necessary to exempt these political jurisdictions, together with their employees, from the tax.

The appropriation measure proposed

the President (U. S. Government Printing Office, Washington, D. C., 1935), p. 29; Committee on Economic Security, *Old-Age Security Staff Report* (mimeographed report, January 1935), p. 30.

the authorization of the amount raised by the taxes described above as a permanent appropriation to be used for building and maintaining the fund from which the old-age benefits should be paid. This proposed appropriation measure provided that a worker, on arrival at the age of 65 years, should receive an annuity based upon the number and amount of tax payments made on his behalf. Under the proposed program, a worker was not eligible for an annuity unless 200 weekly tax payments had been made on his behalf within a 5-year period prior to his attaining age 65. A further condition for the receipt of an annuity was retirement from gainful employment. For workers entering the system during the first 5 years of its existence a minimum benefit of 15 per cent of average wages was proposed. Gradually these benefits would increase with the number and amount of tax payments. It was estimated that a worker who had been covered by the system during his entire working life would receive an annuity representing between 40 and 50 per cent of his average wage.

While it was hoped that the annuities proposed would be adequate for workers of modal earnings, it was realized that the benefit schedule would not permit low-paid workers to earn annuities sufficiently large to permit them to retire from gainful employment. For this reason it was proposed that a larger relative annuity be provided for lower-paid workers by weighting more heavily the first \$15 of average wages in the computation of benefits.

In addition to the annuities payable to workers under the conditions described above, it was proposed that death benefits be provided for the survivors of workers who had been covered by the system. The death benefit was to equal the aggregate amount of the worker's own tax payments less the total amount which the worker had received as an annuity. It was also recommended that provisions be made for a lump-sum endowment to a person who

had made tax payments but who reached age 65 without being qualified for an annuity. The amount proposed as this lump-sum payment was to equal the worker's own tax payments plus interest.

[The table at p. 640] shows the progress of the tax and benefit payments during the next half century under the proposed old-age annuity plan. Under the proposed old-age annuity program the taxes collected would be in excess of the benefits paid out for about 25 years. For this reason a reserve would be accumulated in the old-age fund, which, according to actuarial forecasts, would amount to approximately 15 billion dollars in 1965. Since the forecasts indicated that after that time the benefit payments would be in excess of the taxes collected, it was recommended that, in order to keep the reserve at that level, the Federal Government should obtain the necessary additional funds from taxes borne by the recipients of higher incomes.

Congressional Reconstruction of the Program.—The recommendations briefly outlined above were embodied in titles III and IV of the economic security bill introduced in the House of Representatives on January 17, 1935 (H. R. 4120), but this bill was not enacted. On April 4, 1935, the social security bill (H. R. 7260) was introduced and became law on August 14, 1935 (Public, No. 271, 74th Cong.).

The provisions of the Social Security Act differ considerably from the economic security bill as originally introduced. The following schedule of taxes was adopted by Congress:

	Excise tax on employers' pay rolls (per cent)	Income tax on employees' wages (per cent)
Years		
1937-39	1	1
1940-42	1½	1½
1943-45	2	2
1946-48	2½	2½
1949 and thereafter ..	3	3

LABOR CASES AND MATERIALS

Progress of tax and benefit payments under proposed old-age annuity plan

[All estimates in millions of dollars]

Year	Net tax collections *	Interest on reserve	Federal contribution	Benefit payments	Reserve end of year
1937	302.9	0	0	0.7	302.3
1938	306.0	9.1	0	2.0	615.3
1939	308.9	18.4	0	3.3	939.3
1940	312.0	28.1	0	4.8	1,274.7
1945	672.3	122.4	0	268.0	4,606.4
1950	1,073.3	230.3	0	683.6	8,293.9
1955	1,520.0	345.3	0	1,318.9	12,058.0
1960	1,979.2	437.9	0	2,100.4	14,912.4
1965	2,058.3	458.0	165.7	2,682.0	15,266.7
1970	2,137.5	458.0	632.8	3,228.3	15,266.7
1975	2,216.7	458.0	1,034.3	3,708.9	15,266.7
1980	2,216.7	458.0	1,478.7	4,153.3	15,266.7

* Tax collections less administrative expenses; administrative expenses as per cent of collections as follows:

1937-41	10
1942-46	8½
1947-51	6½
1952-56	5
1957-80	5

A comparison of this schedule with the one recommended shows that the income taxes levied upon workers and the excise taxes levied upon employers not only start at higher rates than in the recommended program but that a maximum of 3 per cent is reached in 1949 instead of the maximum of 2½ per cent in 1957 proposed in the economic security bill. In addition to the variance in rates, the Congress exempted certain employments which were covered by the tax in the original bill. The most important of these exemptions are agricultural labor and domestic service in a private home. The recommendation that nonmanual workers earning in excess of \$250 per month be exempted from the tax was not adopted. Under the Social Security Act the remuneration of manual and nonmanual workers in excess of \$3,000 a year from any one employer will not be subject to the tax. In this manner all employees and their employers regardless of wage level

will pay taxes with respect to the first \$3,000 of annual wages.

Under the act the taxes are collected as are other internal revenues and are not allocated as was proposed to an old-age fund, but are merged with the general funds of the Government in the Treasury.

The provisions of title II of the act differ considerably from the underlying principles of the proposed program. In the first place, the appropriations authorized are not measured by any taxes collected under title VIII, but are measured by an "amount to be determined on a reserve basis in accordance with accepted actuarial principles." The amount required from year to year may be much more or considerably less than the revenues from the taxes levied in title VIII.

Secondly, the worker's right to an annuity and the right of his estate to a death benefit are not conditioned upon the payment of taxes by him or on his behalf; nor is the amount of benefit measured by

the amount of taxes paid as was the case under the provisions of the economic security bill. Benefits are paid to the worker or to his estate on the basis of his status as a worker and are measured by the wages he has earned. Should no taxes be paid, the worker will, nevertheless, receive his annuity and his heirs will be protected. The obligation of the Government to the old-age account is not conditioned upon the realization of sufficient revenue from the taxes to reimburse the Treasury for the appropriation to the old-age account.

The original economic security bill made the receipt of benefits contingent upon the payment of taxes. Thus, persons in employments exempted from the taxes were automatically excluded from the receipt of benefits. In the Social Security Act it is provided that wages received in certain employments are not to be counted in the computation of benefits. The most important of these exempted employments are agricultural labor and domestic service in a private home.

The economic security bill was based on the assumption that higher-paid employees would make their own provision for old-age protection. In the measure as enacted, Congress brought under the benefit system all workers in covered employments regardless of their earnings, but with the provision that only the first \$3,000 of yearly salary paid to the individual by an employer should be counted in the computation of benefits.

Thus, under the provisions of the Social Security Act there exists no interdependence between the taxing and the appropriation provisions. In the sense in which the term is used in other countries, the old-age benefit provisions do not constitute a system of old-age insurance. However, in spite of eliminating the contributory features of the proposed program submitted to Congress, the Government in the Social Security Act has accepted the responsibility of building up a fund from which the worker in industry

will receive a retirement income related to his standard of living as reflected in the wage level at which he has worked.

VOLUNTARY OLD-AGE ANNUITIES

Voluntary Continuance in the Old-Age Annuity System.—In the report of the Committee on Economic Security to the President it was suggested that persons who under the Nation-wide annuity system qualified for annuities by fulfilling minimum requirements of 5 years of coverage and 200 tax payments be permitted to continue tax payments voluntarily until age 65 if they left covered employment before reaching the retirement age. This provision would have made it possible for workers who had only a short period of service in an employment covered by the old-age annuity system to increase the amount of their old-age benefits.

The structure of the old-age benefit program enacted by Congress in the Social Security Act left no possibility for the continuance in the system on a voluntary basis for workers who left covered employment prior to the retirement age.

Annuity Certificates.—In addition to the old-age benefit plan, it was proposed that there be established, as a related but separate undertaking, a voluntary system of old-age annuities. Under such a plan the Government would sell to individuals, on a cost basis, deferred life annuities similar to those issued by commercial insurance companies. In consideration of premiums paid at specified ages, the Government would guarantee the individual concerned a definite amount of income starting at approximately age 65 and continuing throughout the lifetime of the annuitant.

The primary purpose of a plan of this character would be to offer persons not included within the old-age benefit scheme a systematic and safe method of providing for old age. However, the plan could also be used by insured persons as a means

of supplementing the limited old-age income provided under the old-age benefit plan.

It was believed that a satisfactory and workable plan, based on the following principles, could be developed without great difficulty:

(1) The plan should be self-supporting, and premiums and benefits should be kept in actuarial balance by any necessary revision of the rates indicated by periodic reexaminations of the experience.

(2) The terms of the plan should be kept as simple as practicable to effect economical administration and to minimize misunderstanding on the part of the individuals served. This could be accomplished by limiting the types of annuity offered to two or three of the most usual standard forms.

(3) In recognition of the fact that the plan would be intended primarily for the lower- and middle-wage classes, provision should be made for the acceptance of relatively small premiums, such as \$1 per

month, and for limitation of the maximum annuity payable to any individual under the plan to approximately \$100 per month.

(4) The plan should be aimed primarily at the provision of old-age income, and this objective should be recognized by eliminating from the annuity contract the features of cash surrender and loan values and, possibly also, the return of premiums in the event of death prior to retirement.

(5) The plan should be managed by the insurance authority along with the old-age annuity system.

No estimates were made as to the amount of annuity reserves which would be accumulated under a plan such as that proposed above. It was believed, however, that the fiscal problems presented by such reserves would not be serious.

The proposal for a system of voluntary annuities supplementing the old-age benefit system was not included in the Social Security Act as passed by Congress.

IV. THE OLD-AGE PROVISIONS OF THE SOCIAL SECURITY ACT OF 1935

49 Stat. 620, 622, 636.

TITLE I—GRANTS TO STATES FOR OLD-AGE ASSISTANCE

APPROPRIATION

SECTION 1. For the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to aged needy individuals, there is hereby authorized to be appropriated for the fiscal year ending June 30, 1936, the sum of \$49,750,000, and there is hereby authorized to be appropriated for each fiscal year thereafter a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Social Security Board established by Title VII (hereinafter re-

ferred to as the "Board"), State plans for old-age assistance.

STATE OLD-AGE ASSISTANCE PLANS

SEC. 2. (a) A State plan for old-age assistance must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting to any individual, whose claim for old-

age assistance is denied, an opportunity for a fair hearing before such State agency; (5) provide such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be necessary for the efficient operation of the plan; (6) provide that the State agency will make such reports, in such form and containing such information, as the Board may from time to time require, and comply with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and (7) provide that, if the State or any of its political subdivisions collects from the estate of any recipient of old-age assistance any amount with respect to old-age assistance furnished him under the plan, one-half of the net amount so collected shall be promptly paid to the United States. Any payment so made shall be deposited in the Treasury to the credit of the appropriation for the purposes of this title.

(b) The Board shall approve any plan which fulfills the conditions specified in subsection (a), except that it shall not approve any plan which imposes, as a condition of eligibility for old-age assistance under the plan—

(1) An age requirement of more than sixty-five years, except that the plan may impose, effective until January 1, 1940, an age requirement of as much as seventy years; or

(2) Any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for old-age assistance and has resided therein continuously for one year immediately preceding the application; or

(3) Any citizenship requirement which excludes any citizen of the United States.

PAYMENT TO STATES

SEC. 3. (a) From the sums appropriated therefor, the Secretary of the Treasury

shall pay to each State which has an approved plan for old-age assistance, for each quarter, beginning with the quarter commencing July 1, 1935, (1) an amount, which shall be used exclusively as old-age assistance, equal to one-half of the total of the sums expended during such quarter as old-age assistance under the State plan with respect to each individual who at the time of such expenditure is sixty-five years of age or older and is not an inmate of a public institution, not counting so much of such expenditure with respect to any individual for any month as exceeds \$30, and (2) 5 per centum of such amount, which shall be used for paying the costs of administering the State plan or for old-age assistance, or both, and for no other purpose: *Provided*, That the State plan in order to be approved by the Board, need not provide for financial participation before July 1, 1937 by the State, in the case of any State which the Board, upon application by the State and after reasonable notice and opportunity for hearing to the State, finds is prevented by its constitution from providing such financial participation.

(b) The method of computing and paying such amounts shall be as follows:

(1) The Board shall, prior to the beginning of each quarter, estimate the amount to be paid to the State for such quarter under the provisions of clause (1) of subsection (a), such estimate to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such clause, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than one-half of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, (B) records showing the number of aged individuals in the State, and (C) such other investiga-

tion as the Board may find necessary.

(2) The Board shall then certify to the Secretary of the Treasury the amount so estimated by the Board, reduced or increased, as the case may be, by any sum by which it finds that its estimate for any prior quarter was greater or less than the amount which should have been paid to the State under clause (1) of subsection (a) for such quarter, except to the extent that such sum has been applied to make the amount certified for any prior quarter greater or less than the amount estimated by the Board for such prior quarter.

(3) The Secretary of the Treasury shall thereupon, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, pay to the State, at the time or times fixed by the Board, the amount so certified, increased by 5 per centum.

OPERATION OF STATE PLANS

SEC. 4. In the case of an, State, plan for old-age assistance which has been ap-

proved by the Board, if the Board, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—

(1) that the plan has been so changed as to impose any age, residence, or citizenship requirement prohibited by section 2 (b), or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or

(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 2 (a) to be included in the plan; the Board shall notify such State agency that further payments will not be made to the State until the Board is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such State. . . .

TITLE II—FEDERAL OLD-AGE BENEFITS

OLD-AGE RESERVE ACCOUNT

SECTION 201. (a) There is hereby created an account in the Treasury of the United States to be known as the "Old-Age Reserve Account" hereinafter in this title called the "Account." There is hereby authorized to be appropriated to the Account for each fiscal year, beginning with the fiscal year ending June 30, 1937, an amount sufficient as an annual premium to provide for the payments required under this title, such amount to be determined on a reserve basis in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 per centum per annum com-

pounded annually. The Secretary of the Treasury shall submit annually to the Bureau of the Budget an estimate of the appropriations to be made to the Account.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the amounts credited to the Account as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be

issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Account. Such special obligations shall bear interest at the rate of 3 per centum per annum. Obligations other than such special obligations may be acquired for the Account only on such terms as to provide an investment yield of not less than 3 per centum per annum.

(c) Any obligations acquired by the Account (except special obligations issued exclusively to the Account) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Account shall be credited to and form a part of the Account.

(e) All amounts credited to the Account shall be available for making payments required under this title.

(f) The Secretary of the Treasury shall include in his annual report the actuarial status of the Account.

OLD-AGE BENEFIT PAYMENTS

SEC. 202. (a) Every qualified individual (as defined in section 210) shall be entitled to receive, with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit (payable as nearly as practicable in equal monthly installments) as follows:

(1) If the total wages (as defined in section 210) determined by the Board to have been paid to him, with respect to employment (as defined in section 210) after December 31, 1936, and before he attained the age of sixty-five, were not more than \$3,000, the old-age benefit shall be at a monthly rate of one-half of 1 per centum of such total wages;

(2) If such total wages were more than

\$3,000, the old-age benefit shall be at a monthly rate equal to the sum of the following:

(A) One-half of 1 per centum of \$3,000; plus

(B) One-twelfth of 1 per centum of the amount by which such total wages exceeded \$3,000 and did not exceed \$45,000; plus

(C) One-twenty-fourth of 1 per centum of the amount by which such total wages exceeded \$45,000.

(b) In no case shall the monthly rate computed under subsection (a) exceed \$85.

(c) If the Board finds at any time that more or less than the correct amount has theretofore been paid to any individual under this section, then, under regulations made by the Board, proper adjustments shall be made in connection with subsequent payments under this section to the same individual.

(d) Whenever the Board finds that any qualified individual has received wages with respect to regular employment after he attained the age of sixty-five, the old-age benefit payable to such individual shall be reduced, for each calendar month in any part of which such regular employment occurred, by an amount equal to one month's benefit. Such reduction shall be made, under regulations prescribed by the Board, by deductions from one or more payments of old-age benefit to such individual.

PAYMENTS UPON DEATH

SEC. 203. (a) If any individual dies before attaining the age of sixty-five, there shall be paid to his estate an amount equal to $3\frac{1}{2}$ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936.

(b) If the Board finds that the correct amount of the old-age benefit payable to a qualified individual during his life under section 202 was less than $3\frac{1}{2}$ per

centum of the total wages by which such old-age benefit was measurable, then there shall be paid to his estate a sum equal to the amount, if any, by which such $3\frac{1}{2}$ per centum exceeds the amount (whether more or less than the correct amount) paid to him during his life as old-age benefit.

(c) If the Board finds that the total amount paid to a qualified individual under an old-age benefit during his life was less than the correct amount to which he was entitled under section 202, and that the correct amount of such old-age benefit was $3\frac{1}{2}$ per centum or more of the total wages by which such old-age benefit was measurable, then there shall be paid to his estate a sum equal to the amount, if any, by which the correct amount of the old-age benefit exceeds the amount which was so paid to him during his life.

PAYMENTS TO AGED INDIVIDUALS NOT QUALIFIED FOR BENEFITS

SEC. 204. (a) There shall be paid in a lump sum to any individual who, upon attaining the age of sixty-five, is not a qualified individual, an amount equal to $3\frac{1}{2}$ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five.

(b) After any individual becomes entitled to any payment under subsection (a), no other payment shall be made under this title in any manner measured by wages paid to him, except that any part of any payment under subsection (a) which is not paid to him before his death shall be paid to his estate. . . .

DEFINITIONS

SEC. 210. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remunera-

tion equal to \$3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

- (1) Agricultural labor;
- (2) Domestic service in a private home;
- (3) Casual labor not in the course of the employer's trade or business;

(4) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(c) The term "qualified individual" means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He is at least sixty-five years of age; and

(2) The total amount of wages paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five, was not less than \$2,000; and

(3) Wages were paid to him, with respect to employment on some five days after December 31, 1936, and before he attained the age of sixty-five, each day being in a different calendar year.

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

INCOME TAX ON EMPLOYEES

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum.

DEDUCTION OF TAX FROM WAGES

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(b) If more or less than the correct amount of tax imposed by section 801 is paid with respect to any wage payment, then, under regulations made under this title, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent wage pay-

ments to the same individual by the same employer. . . .

EXCISE TAX ON EMPLOYERS

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum. . . .

COLLECTION AND PAYMENT OF TAXES

SEC. 807. (a) The taxes imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections. . . .

DEFINITIONS

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to \$3,000 has been paid to an individual by an employer with respect to employment during any calendar year,

is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

- (1) Agricultural labor;
- (2) Domestic service in a private home;
- (3) Casual labor not in the course of the employer's trade or business;
- (4) Service performed by an individual who has attained the age of sixty-five;
- (5) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(6) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(7) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

V. THE COURT AND THE SOCIAL SECURITY ACT

HELVERING *v.* DAVIS

Supreme Court of the United States. 1937.
301 U. S. 619; 51 Sup. Ct. 904; 81 L. Ed. 1307.

Doubts as to the Supreme Court's attitude on federal old age pension laws were raised by its decision on the 1934 railroad pension law (see the two *Alton* cases, below). These doubts were resolved by the decision in *Helvering v. Davis*.

* * * *

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The Social Security Act . . . is challenged once again.

. . . In this case Titles VIII and II are the subject of attack. Title VIII lays another excise tax upon employers. . . . It lays a special income tax upon employees to be deducted from their wages and paid by the employers. Title II provides for the payment of Old Age Benefits, and supplies the motive and occasion, in the view of the assailants of the statute, for the levy of the taxes imposed by Title VIII. . . .

The scheme of benefits created by the provisions of Title II is not in contra-

vention of the limitations of the Tenth Amendment.

Congress may spend money in aid of the "general welfare." . . . Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. . . . Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.

The purge of nation-wide calamity

that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from State to State, the hinterland now settled that in pioneer days gave an avenue of escape. . . . Spreading from State to State, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation. If this can have been doubtful until now, our ruling . . . in the case of the *Steward Machine Co.* . . . has set the doubt at rest. But the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. The President's Committee on Economic Security made an investigation and report, aided by a research staff of Government officers and employees, and by an Advisory Council and seven other advisory groups. Extensive hearings followed before the House Committee on Ways and Means, and the Senate Committee on Finance. A great mass of evidence was brought together supporting the policy which finds expression in the act. . . .

The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for

that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged. This is brought out with a wealth of illustration in recent studies of the problem. Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. We have seen this in our study of the problem of unemployment compensation. . . . A system of old-age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all.

Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom. . . .

Fourth. The tax upon employers is a valid excise or duty upon the relation of employment.

As to this we need not add to our opinion in *Steward Machine Co. v. Davis* . . . where we considered a like question in respect of Title IX.

* *

[Justice McReynolds and Butler dissented, holding that Title II of the Social Security Act violated the Tenth Amendment of the United States Constitution.]

VI. AMENDING THE SOCIAL SECURITY ACT

The Supreme Court's decision in the *Davis* case removed doubts as to the legality of the old-age provisions of the Social Security Act.

However, criticism of the Act continued; friends, as well as opponents, of public old-age benefits and assistance, expressed their

Old-Age and survivors insurance: Provisions enacted in 1935 and in the 1939 amendments to the Social Security Act

Provision	1935 act	1939 amendments
Monthly benefits first payable	January 1942	January 1940.
Age limits for persons qualifying for monthly benefits.	Must have attained age 65 at some time after Jan. 1, 1941.	Age 65 or over for all old-age benefits (primary annuitant, wife, widow, or dependent parents). Under 16, or 18 if still in school, for dependent children. No age limits for widows with dependent children.
Contribution rates of workers and of employers (percentage of pay rolls).	1 per cent, 1937-39 1½ per cent, 1940-42 2 per cent, 1943-45 2½ per cent, 1946-48 3 per cent, 1949 and thereafter	1 per cent, 1939-42; 2 per cent, 1943-45; 2½ per cent, 1946-48; 3 per cent, 1949 and thereafter.
Excepted employment	Employment after age 65, employment in agriculture, private domestic service, government, certain nonprofit organizations; maritime employment, etc.	Nearly the same except that employment after age 65, employment in national banks, and some maritime employment are covered.
Total monthly benefits payable with respect to 1 person's wages:		
Minimum	\$10	\$10 for primary annuitant; \$15 for primary annuitant and 1 dependent (aged wife or dependent child); \$20 for annuitant and 2 or more dependents.
Maximum	\$85	\$10 for widow aged 65 or over without dependent child. \$12.50 for widow and 1 dependent child; \$17.50 for widow and 2 dependent children; \$20 for widow and 3 or more dependent children. If no widow survives, \$10 for 1 or 2 dependent children; \$15 for 3, \$20 for 4 or more. \$10 for 1 or both wholly dependent aged parents. \$85, or twice primary benefit, or 80 per cent of legally defined average monthly wage, whichever is least. (These maximums are not imposed on total benefits of less than \$20 and may not reduce total of benefits below \$20.)
Formula for computing primary monthly benefit	½ of 1 per cent of first \$3,000 total wages, ¹ plus ½ of 1 per cent of next \$42,000, plus ¼ of 1 per cent of next \$84,000.	a. 40 per cent of first \$50 of legally defined average monthly wage plus 10 per cent of average monthly wage in excess of \$50 but not over \$250, plus b. 1 per cent of amount computed under (a) for each year in which wages 2 of \$200 were received.
Supplementary benefits:		
Wife aged 65 or over	None	50 per cent of primary benefit.
Dependent child	None	50 per cent of primary benefit.

Survivors and lump-sum death payments:

1. Lump-sum death payments

2. Monthly benefits to survivors of a fully insured individual:

- (a) Widow aged 65 or over
- (b) Widow having dependent child ..
- (c) Each dependent child ..
- (d) Each wholly dependent aged parent (if no widow or unmarried child under 18 survives).

3. Monthly benefits to survivors of currently insured individuals:

- (a) Widow having dependent child (in addition to child's benefits) ..
- (b) Each dependent child ..

Payment to workers failing to qualify for monthly benefits.

Eligibility requirements:

- (a) Fully insured

- (b) Currently insured

Monthly benefit not payable

Amount equal to 3½ per cent of total wages less monthly benefits received.

None

.....

None

.....

 Lump-sum payment amounting to 3½ per cent of total credited wages payable at age 65.

\$2,000 cumulative wages received; 1 day of covered employment in each of 5 years after 1936 and before age 65.

None

For months when in "regular employment" for which wages have been paid.

Amount equal to 6 times the primary benefit, provided that the deceased worker was fully or currently insured and left no widow, child, or parent who would, on filing application in the month of his death, be entitled to a monthly survivors benefit for such month.

75 per cent of primary benefit.
 75 per cent of primary benefit.
 50 per cent of primary benefit.
 50 per cent of primary benefit.

75 per cent of primary benefit.

50 per cent of primary benefit.
 None

Wages of at least \$50 paid in each of 40 quarters or in ¼ as many quarters as the number elapsing after 1936 or after attainment of age 21, whichever is later, and before attainment of age 65 or death, whichever is earlier. Minimum, 6 quarters.

Wages of at least \$50 paid for each of at least 6 out of the 12 quarters immediately preceding the quarter in which death occurred.

For months in which:

- (a) Services are rendered for wages of \$15 or more;
- (b) Widow under age 65 has no dependent child in her care;
- (c) Children between 16 and 18 are not regularly attending school.

¹ "Wages" is used in this column as referred to in sec. 202 (a) (1) and defined

in sec. 210 of the Social Security Act of 1935.

Source: Social Security Board, *Fourth Annual Report* (Washington: Government Printing office, 1940), facing p. 169.

² "Wages" is used throughout this column as defined in title II, sec. 209 (a) of the Social Security Act as amended in 1939.

disapproval of at least some provisions. Simultaneously, the Social Security Board, in co-operation with a special committee of the U. S. Senate Committee on Finance, set up an Advisory Council on Social Security, consisting of representatives of labor, industry, and the public. From a variety of sources, there came suggestions for amendment. Among the items most frequently mentioned were: the dangers inherent in accumulating a vast reserve in the Old-Age Reserve Account, the desirability of deferring the increase in taxes on payrolls and wages, the need for extension to groups not covered, the provision of survivors' annuities, and change of the basis of computation of the benefits. The Social Security Board itself made a series of recommendations for amending the law.¹

¹ See, for example, the statement of Arthur J. Altmeyer, chairman of the Social Security Board,

On August 10, 1939, President Roosevelt signed the bill which introduced significant changes into the Social Security Act.² The effect of these amendments so far as old-age assistance is concerned is to increase the maximum contribution of the federal government from \$15 to \$20 a month: i. e., the federal government will match the grants by states for old-age assistance dollar for dollar up to a maximum of \$20 a month, which means \$40 assistance per month to the individual.

Far more substantial changes were made in the old-age benefit part of the law. The chart on pp. 650-51, compares the major benefit provisions of the 1935 and the 1939 laws.

at the Hearing on Social Security Legislation Before the House Ways and Means Committee, February 1, 1939, Social Security Board Release, pp. 24-35.—E.S.

² Public No. 379—76th Congress.—E.S.

VII. FEDERAL OLD-AGE PENSIONS FOR RAILROAD EMPLOYEES

RAILROAD RETIREMENT BOARD *v.* ALTON RAILROAD COMPANY

Supreme Court of the United States. 1935.
295 U. S. 330; 55 Sup. Ct. 758; 79 L. Ed. 1468.

Even before the Social Security Act, Congress had enacted a law providing for old-age pensions for railroad employees engaged in interstate commerce. This law, dated June 27, 1934, provided that pensions were to be paid out of a fund to which equal contributions were to be made by the railroads and their employees. The constitutionality of this law was the issue before the Supreme Court in the case of *Railroad Retirement Board v. Alton Railroad Company*.

The 1934 law was challenged on two grounds: (1) it deprived the railroad of its property without due process; (2) it was not within the commerce power. By a vote of 5 to 4, the Supreme Court held the law unconstitutional. Due process was violated, the Court said, by the provisions of the act covering pensions for men who used to be, but are not now, in railroad service, and by the provisions which, treating all the railroads as one employer (i. e., pooling of funds), discriminated against railroads with young employees and against existing railroads (since

they had to bear the cost of pensions for employees of defunct railroads). Other aspects specifically objected to by the Court were the fact that no specific length of service was required for eligibility to pensions, so that employees might get pensions even though they had worked only ten years or were discharged for cause; further, though the pension contributions were supposed to be equal, many employees who had made no payment would be eligible for pensions. In addition, the opinion pointed out that the cost to the railroads would be enormous; this would not of itself operate to make the law unconstitutional but it would help.

The Court then went on to consider the power of Congress under the commerce clause to provide pensions for railroad employees.

* * * *

MR. JUSTICE ROBERTS: . . . If these ends demand the elimination of aged employees, their retirement from the service

would suffice to accomplish the object. For these purposes the prescription of a pension for those dropped from service is wholly irrelevant. The petitioners, conscious of the truth of this statement, endeavor to avoid its force by the argument that social and humanitarian considerations demand the support of the retired employee. They assert that it would be unthinkable to retire a man without pension and add that attempted separation of retirement and pensions is unreal in any practical sense, since it would be impossible to require carriers to cast old workers aside without means of support. The supposed impossibility arises from a failure to distinguish Constitutional power from social desirability. The relation of retirement to safety and efficiency is distinct from the relation of a pension to the same ends, and the two relationships are not to be confused.

In final analysis, the petitioners' sole reliance is the thesis that efficiency depends upon morale, and morale in turn upon assurance of security for the worker's old age. Thus pensions are sought to be related to efficiency of transportation, and brought within the commerce power. In supporting the Act the petitioners constantly recur to such phrases as "old age security," "assurance of old age security," "improvement of employee morale and efficiency through providing definite assurance of old age security," "assurance of old age support," "mind at ease," and "fear of old age dependency." These expressions are frequently connected with assertions that the removal of the fear of old age dependency will tend to create a better morale throughout the ranks of employees. The theory is that one who has an assurance against future dependency will do his work more cheerfully, and therefore more efficiently. The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type, is in any just sense a regulation of interstate

transportation. If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power. The answer of the petitioners is that not all such means of promoting contentment have such a close relation to interstate commerce as pensions. This is in truth no answer, for we must deal with the principle involved and not the means adopted. If contentment of the employee were an object for the attainment of which the regulatory power could be exerted, the courts could not question the wisdom of methods adopted for its advancement.

No support for a plan which pensions those who have retired from the service of the railroads can be drawn from the decisions of this court sustaining measures touching the relations of employer and employee in the carrier field in the interest of a more efficient system of transportation. The Safety Appliance Acts, the Employers' Liability Acts, hours-of-service laws, and others of analogous character, cited in support of this Act, have a direct and intimate connection with the actual operation of the railroads. No less inapposite are the statutes which deal with ex-

change of facilities, joint facilities, joint rates, etc. For these have an obvious and direct bearing on the obligations of public service incident to the calling of the railroads. The railway labor act was upheld by this court upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation. It was pointed out that the act did not interfere with the normal right of the carrier to select its employees or discharge them. *Texas & New Orleans R. R. Co. v. Railway Clerks*, 281 U. S. 548, 570-1. The legislation considered in *Wilson v. New*, 243 U. S. 332, was drafted to meet a particular exigency and its validity depended upon circumstances so unusual that this court's decision respecting it cannot be considered a precedent here.

Stress is laid upon the supposed analogy between workmen's compensation laws and the challenged statute. It is said that while Congress has not adopted a compulsory and exclusive system of workmen's compensation applicable to interstate carriers, no one doubts the power so to do; and the Retirement Act cannot in principle be distinguished. The contention overlooks fundamental differences. Every carrier owes to its employees certain duties the disregard of which render it liable at common law in an action sounding in tort. Each state has developed or adopted, as part of its jurisprudence, rules as to the employer's liability in particular circumstances. These are not the same in all the states. In the absence of a rule applicable to all engaged in interstate transportation the right of recovery for injury or death of an employee may vary depending upon the applicable state law. That Congress may, under the commerce power, prescribe an uniform rule of liability and a remedy uniformly available to all those so engaged, is not open to doubt. The

considerations upon which we have sustained compulsory workmen's compensation laws passed by the states in the sphere where their jurisdiction is exclusive apply with equal force in any sphere wherein Congress has been granted paramount authority. Such authority it may assert whenever its exercise is appropriate to the purpose of the grant. A case in point is the Longshoremen's and Harbor Workers' Compensation Act, passed pursuant to the delegation of admiralty jurisdiction to the United States. Modern industry, and this is particularly true of railroads, involves instrumentalities, tasks and dangers unknown when the doctrines of the common law as to negligence were developing. The resultant injuries to employees, impossible of prevention by the utmost care, may well demand new and different redress than that afforded in the past. In dealing with the situation it is permissible to substitute a new remedy for the common law right of action; to deprive the employer of common law defenses and substitute a fixed and reasonable compensation commuted to the degree of injury; to replace uncertainty and protracted litigation with certainty and celerity of payment; to eliminate waste; and to make the rule of compensation uniform throughout the field of interstate transportation, in contrast with inconsistent local systems. By the very certainty that compensation must be paid for every injury such legislation promotes and encourages precaution on the part of the employer against accident and tends to make transportation safer and more efficient. The power to prescribe an uniform rule for the transportation industry throughout the country justifies the modification of common law rules by the Safety Appliance Acts and the Employers' Liability Acts applicable to interstate carriers, and would serve to sustain compensation acts of a broader scope, like those in force in many states. The collateral fact that such a law may produce contentment among employees,—an object which as a

separate and independent matter is wholly beyond the power of Congress,—would not, of course, render the legislation unconstitutional. It is beside the point that compensation would have to be paid despite the fact that the carrier has performed its contract with its employee and has paid the agreed wages. Liability in tort is imposed without regard to such considerations; and in view of the risks of modern industry the substituted liability for compensation likewise disregards them. Workmen's compensation laws deal with existing rights and liabilities by readjusting the old benefits and burdens incident to the relation of employer and employee. Before their adoption the employer was bound to provide a fund to answer the lawful claims of his employees; the change is merely in the required disbursement of that fund in consequence of the recognition that the industry should compensate for injuries occurring with or without fault. The act with which we are concerned seeks to attach to the relation of employer and employee a new incident, without reference to any existing obligation or legal liability, solely in the interest

of the employee, with no regard to the conduct of the business, or its safety or efficiency, but purely for social ends. . . .

. . . We think it cannot be denied, and, indeed, is in effect admitted, that the sole reliance of the petitioners is upon the theory that contentment and assurance of security are the major purposes of the Act. We cannot agree that these ends if dictated by statute, and not voluntarily extended by the employer, encourage loyalty and continuity of service. We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old-age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfilment of the railroads' duty to serve the public in interstate transportation.

The judgment of the Supreme Court of the District of Columbia is *Affirmed*.

ALTON RAILROAD COMPANY *v.* RAILROAD RETIREMENT BOARD

District Court of the United States for the District of Columbia. 1936.
16 Fed. Supp. 955.

A few months after the Supreme Court held the 1934 Railroad Retirement Act unconstitutional, Congress passed a second one, very much like the Social Security Act. The 1935 act was two laws: one laid a tax of 3½ per cent on the income of railroad employees not in excess of \$300 per month and a tax of 3½ per cent of the payroll of the railroads no in excess of \$300 per month per employee; the second statute provided for the payment of retirement benefits. Obviously, the two statutes were interrelated, but it appeared to be the hope of the sponsors that the separation of the revenue-raising measure from the benefits would meet the constitutional objections. About four months after this measure was enacted, virtually all the

Class I railroads brought suit to enjoin the collection of the taxes.

BAILEY, J. . . .

The provisions of the two Acts in question are so interrelated and interdependent that each is a necessary part of one entire scheme. This is not only apparent from the terms of the Acts themselves but is shown by their legislative history. . . .

The defendants claim that the Court, in determining the constitutionality of the taxing act, cannot take into consideration the provisions of the Retirement Act, that the funds arising from the taxing act are

not "ear marked," not kept as a separate fund for the payment of the pensions provided for in the Retirement Act, and so far as the constitutionality of the taxing act is concerned its provisions alone can be considered. But apart from any question whether the tax act is so arbitrary and capricious when taken out of its setting as to be an unconstitutional taking of property without due process of law, the purpose of Congress in passing it, is clearly as shown above to provide funds for pensions under the Retirement Act, and not to provide for the expenses of the government. If the effect of the two Acts taken together is to take the property of one class for the benefit of another, and the taxing act was not intended to provide for the expenses of government, but solely for a purpose which the Supreme Court has held not to be within the domain of the federal government, it would seem to be immaterial whether the funds raised by the tax act are to be segregated in the Treasury; that would be a mere matter of bookkeeping, and would not affect the right of the taxpayer. . . .

I think that from what has been said, it necessarily follows that the two Acts are inseparable parts of a whole, that Congress would not have enacted one without the other, that the taxes levied under the tax Act are the contributions required under the Act of 1934, and to hold otherwise, would in the language of the Supreme Court in the *Butler* [A. A. A.] case "shut our (my) eyes to what all others than we (I) can see and understand."

This being true it is clear that under the views of the Supreme Court in the *Alton* case the taxing act transcends the powers of Congress. The pension system so created is substantially the same as that created by the Act of 1934, and apart from its unconstitutionality as a whole subject to the same objections in certain particulars as those pointed out by the Supreme Court in that case. . . .

But whether the findings of the Supreme Court in the *Alton* case are findings of fact based upon the record in that case or upon facts of which that Court took judicial knowledge, it would require evidence, practically conclusive in its nature, to justify a trial court in making findings that were not in consonance with those of the Supreme Court. No such evidence exists in the case at bar. The evidence is conflicting as to many questions of fact and whatever might be my individual views, I am bound by the decision in that case, which disposes of any question as to the validity of a compulsory pension system based in part upon enforced contributions from the carriers, and I feel that I am constrained therefore to hold that the tax Act is unconstitutional as applied to the carriers. . . .

* * * *

The impasse as to a railroad retirement plan was brought to an end early in 1937 by an agreement between the Association of American Railroads and representatives of the twenty-one standard railway unions. The agreement called for a total tax of $5\frac{1}{2}$ per cent of the payroll, not in excess of \$300 per month per employee, to be borne equally by the workers and the railroads; this tax was to be increased gradually to $7\frac{1}{2}$ per cent (the old laws provided for a 7 per cent rate). There were various other changes: for example, the earliest age of retirement was changed from fifty to sixty. Further, the plan provided for joint and survivor annuities, so that the railroad worker could elect a pension plan which would make provision for his wife in case she survived him. All benefits were to be paid out of the United States Treasury.

Congress passed the necessary legislation in 1937. In drawing up the plan, the railroads made a "gentlemen's agreement" that they would not contest the constitutionality of the new laws. In view of the decisions of the Supreme Court on the Social Security Act cases (see *Helvering v. Davis*, above), however, there appeared little chance that the Supreme Court would set aside the 1937 railroad retirement acts.

BIBLIOGRAPHY

PART ONE. GOVERNMENTAL INFLUENCES ON COLLECTIVE BARGAINING

Before making bibliographical suggestions that relate to the several chapters separately, we shall note a number of publications which are of general usefulness in studying governmental influences on collective bargaining.

Text-book accounts of the subject include Chap. 7, "Collective Bargaining," in John R. Commons and John B. Andrews, *Principles of Labor Legislation*, fourth revised edition (New York: Harper & Brothers, 1936); Chaps. 25-31 in Emanuel Stein and others, *Labor Problems in America* (New York: Farrar & Rinehart, Inc., 1940); Chaps. 22-23 in Carroll R. Daugherty, *Labor Problems in American Industry*, revised edition (Boston: Houghton Mifflin Company, 1938); and Chaps. 41-46 in Lois MacDonald, *Labor Problems and the American Scene* (New York: Harper & Brothers, 1938). Every text-book on labor problems of course deals with this subject to some extent. A short and relatively simple legal text-book is Abraham and Noah Rotwein, *Labor Law* (Brooklyn: Harmon Publications, 1939).

Labor histories are recommended, for the readers of this book, chiefly for general background and for accounts of the policing of important strikes. See especially Selig Perlman and Philip Taft, "Labor Movements" (1896-1932), vol. 4 of *History of Labor in the United States* (New York: The Macmillan Company, 1935), Samuel Yellen, *American Labor Struggles* (New York: Harcourt Brace & Company, 1936), and Edward Levinson, *Labor on the March* (New York: Harper & Brothers, 1938). Mediation as well as policing is treated in Edward Berman, *Labor Disputes and the President of the United States* (New York: Columbia University Press, 1924).

Learned journals sometimes carry articles or book-notices in this field; the ones most likely to carry them are the law journals, which are usually rather technically worded. A specialized labor law journal in the lower price range is the *Monthly Bulletin* of the International Juridical Association (New York), which has appeared since 1932. The *Monthly Labor Review* of the U. S. Department of Labor carries occasional articles and summaries of court decisions, and the monthly *Industrial Bulletin* of the New York Department of Labor has similar material.

Two services in the upper price range undertake to provide a fairly complete review of the field, and libraries often carry one of the two. One is the weekly *Labor Relations Reporter*, put out by the Bureau of National Affairs, Inc., Washington, D. C.; its material is later issued in bound form in successive volumes as the *Labor Relations Reference Manual*. The other is the loose-leaf *Labor Law Service* of Commerce Clearing House, Inc., Chicago, Ill. Part of the service is the current reporting, in full or in digest, of court opinions in labor cases; from time to time these are bound in a series of volumes called *Labor Cases*.

The texts of federal labor laws (those relating to unionism, and others) are found in a low-priced federal publication entitled *Compilation of Laws Relating to Mediation [etc.]*, which is revised from time to time. Current amendments to laws are briefly noted in an annual publication, *Digest of State and Federal Labor Legislation*,

of the Division of Labor Standards of the U. S. Department of Labor, as well as yearly in the December issue of the *American Labor Legislation Review*. Annual reports are issued by the National Labor Relations Board; the National Mediation Board (relating to railroad labor, including the work of the adjustment boards); and the Conciliation Service, whose report is printed with the Secretary of Labor's and whose current activities are recorded in the *Monthly Labor Review*.

There are two law-school case-books which cover the field of governmental influences on collective bargaining; they print cases which overlap to some extent with those printed in this book. One is James M. Landis, *Cases in Labor Law* (Chicago: The Foundation Press, 1934), to which has been added Nathan Witt, *Supplement to Landis' Cases in Labor Law, 1934-37*. The other is Walter H. E. Jaeger, *Cases and Statutes on Labor Law* (Rochester: The Lawyers Co-operative Publishing Company, 1939).

For the period before 1932, a useful book is Edwin E. Witte, *The Government in Labor Disputes* (New York: McGraw-Hill Book Company, 1932), which contains good bibliographical notes. The same may be said of Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: The Macmillan Company, 1930), though it is mostly devoted to the problem of limiting injunctions. A publication that includes a systematic account of the legal status of trade unions in almost all countries up to about the same date is International Labor Office, "Freedom of Association," 5 volumes in *Studies and Reports, Series A* (Geneva: International Labor Office, 1927-30).

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A useful text-book covering almost the whole field is John R. Commons and John B. Andrews, *Principles of Labor Legislation*, fourth revised edition (New York: Harper & Brothers, 1936). A similar coverage, in historical terms, is found in Elizabeth Brandeis, "Labor Legislation," in vol. 3 (the Lescohier and Brandeis volume) of *History of Labor in the United States* (New York: The Macmillan Company, 1935).

Other text-book readings include Chaps. 32-36 in Emanuel Stein and others, *Labor Problems in America* (New York: Farrar & Rinehart, Inc., 1940); Chaps. 20-21 and 24 in Carroll R. Daugherty, *Labor Problems in American Industry*, revised edition (Boston: Houghton Mifflin Company, 1938); Chaps. 32-40 in Lois MacDonald, *Labor Problems and the American Scene* (New York: Harper & Brothers, 1938); and Chaps. 12-19 in Richard A. Lester, *Economics of Labor* (New York: The Macmillan Company, 1941).

Learned journals occasionally have articles or book-notices in this field. The *Monthly Labor Review* of the U. S. Department of Labor carries occasional articles and the monthly *Industrial Bulletin* of the New York Department of Labor has similar material. A quarterly specializing in this material is the *American Labor Legislation Review*.

Since the passage of the Fair Labor Standards Act the legal regulation of hours, wages, and child labor (see Chaps. 6-8) are more often treated together, especially the former two. The *Wage-Hour Reporter*, a weekly issued by the Bureau of National Affairs, Inc., Washington, D. C., is devoted to this subject.

Different sorts of social security are often treated together, so that a number of books mentioned in the bibliographies of Chaps. 10 or 11 or 12 also relate to the other two social security chapters. The reader is also referred in general to the publications of the U. S. Social Security Board, including its *Annual Reports* and its monthly technical magazine, *Social Security Bulletin*; and to the monthly *Social Security* of the American Association for Social Security.

Material on wage-hour regulation and social security laws may also be found in the loose-leaf services put out by Commerce Clearing House, Inc., Chicago, Ill., and Prentice-Hall, Inc., New York, N. Y.

Many publications of the U. S. Bureau of Labor Statistics deal with the field of governmental influence on the terms of the labor contract. Among these may be mentioned an annual series, *Labor Laws and their Administration*, which contain the proceedings of the annual conventions of the International Association of Governmental Labor Officials. Recently the Division of Labor Standards has taken over much of the work of the Bureau in this field. One of its publications is an annual *Digest of State and Federal Labor Legislation*; another an annual booklet reporting the proceedings of the yearly National Conference on Labor Legislation; another is a *Handbook of Federal Labor Legislation*.

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TABLE OF CASES

This table contains, in capital letters, the names of cases reported in this volume; and, in italics, the names of cases cited but not reported. The numbers refer to the pages on which the cases are cited, except that after the name of each *reported* or capital-letter case is given first, in italic figures, the number of the page on which the report of the case begins. Thus, the first case on the list, "*Abrams v. U. S.*, 95," is not a case reported here but is cited on p. 95. The second case, "*Adair v. U. S.*, 238; 101, 111, 112, 248, 287, 300, 310," is reported, beginning on p. 238, and is also cited or discussed on the other pages. By looking up those pages, it is possible to see how a number of judges have viewed the decision in question, and how it relates to various subjects in different chapters. Cases are given in this table under the name of the plaintiff and generally also under the name of the defendant. But less important cases are given only once, by their usual names, and a few cited cases were not thought appropriate for any mention here.

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